Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

CHARLES F. LAMBETH, JR., AND MICHAEL D. LEA,

Petitioners,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For religious reasons, respondent recently installed "In God We Trust" prominently over the main entrance to its seat of government. The United States Court of Appeals for the Fourth Circuit held that a complaint challenging this action as violative of the Establishment Clause failed to state a claim because (1) the complaint did not allege that the governmental action was "entirely motivated by a purpose to advance religion" and thus did not satisfy the first prong of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), and (2) the endorsement test of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000), was only an enhancement of the second *Lemon* prong and did not apply to the determination of secular purpose under the first prong. Subsequently this Court held in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. ___, 125 S. Ct. 2722 (2005), contrary to each of the holdings of the Fourth Circuit, that (1) an "ostensible and predominant purpose of advancing religion" sufficed to state a claim of Establishment Clause violation, and (2) the endorsement test applied to the determination of secular purpose. The question presented is:

Should the court of appeals' decision be vacated and remanded in light of the directly conflicting holdings in *McCreary County*?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, to vacate that judgment, and to remand the case for further consideration in light of this Court's supervening decision in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722 (2005).

OPINIONS BELOW

The District Court opinion (per Osteen, D.J.), granting respondents' motion to dismiss for failure to state a claim (Appendix ("Pet. App.") 18a), is published at 321 F. Supp. 2d 688 (M.D.N.C. 2004). The Fourth Circuit opinion (per King, J., joined by Widener, J. and Henry F. Floyd, D.J.), affirming (Pet. App. 1a), is published at 407 F.3d 266 (4th Cir. 2005).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on May 13, 2005. No petition for rehearing or rehearing *en banc* was filed. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. I: "Congress shall make no law respecting an establishment of religion . . .".

STATEMENT OF THE CASE

Petitioners, attorneys who live and practice in Davidson County, North Carolina, brought this action pursuant to 42 U.S.C. § 1983 on June 24, 2003. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Petitioners claimed that the installation six months earlier of the words "In God We Trust"[1] in 18 inch letters over the main entrance to the new Davidson County Governmental Center, the seat of government of Davidson County, North Carolina, was a violation of the Establishment Clause of the First Amendment to the United States Constitution. Pet. App. 58a-3(a)-(g). These words were more prominently displayed than the name of the building, which was the only other writing on the front façade. Pet. App. 59a(i)-(l).

Petitioners alleged that respondent "intended [to] affix a prominent religious message" to its seat of government, Pet. App. 58a(r); that, at the meeting authorizing the display, the religious nature of the words was repeatedly emphasized by members of the public and by some of the Commissioners who voted in favor of the installation, Pet. App. 60a(u),(v); that one of the Commissioners who voted in favor said that a nay vote "would be perceived as a vote against God," Pet. App. 60a(y); and that the fact that "In God We Trust" is the national motto was "mentioned but not emphasized" at the meeting, Pet. App. 60a(w).

Petitioners further alleged that "In God We Trust" as and where installed conveyed a religious message to almost all who saw it, Pet. App. 59a(p); that its location indicated that it was a message from the government, Pet. App. 59a(s); that

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1. As installed these words were not in quotation marks.

the words were not identified as the national motto either inside or outside the building, Pet. App. 59a(m),(n); that no contrary or impeaching message would be allowed, Pet. App. 60a(aa)-61a(c); and that a reasonable observer would perceive the display to be an endorsement of religion, Pet. App. 61a(ff).

The United States District Court for the Middle District of North Carolina dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[2] Pet. App. 16a, 17a. The United States Court of Appeals for the Fourth Circuit affirmed. Pet. App. 1a.

The court of appeals first held that the tests of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971), were controlling, Pet. App. 4a-5a, and that the "endorsement test" of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000) was only an enhancement of *Lemon* and only to be used in applying the second *Lemon* test. Pet. App. 5a. It then held that in order to state a claim under the first *Lemon* test the complaint must allege that respondent's action

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2. The dismissal was of the First Amended Complaint. Respondent had moved to dismiss the initial complaint pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners amended as of right pursuant to Fed. R. Civ. P. 15(a). Respondent renewed its motion to dismiss. An amicus was allowed to move to dismiss for lack of standing. Petitioners then moved for leave to file a second amended complaint, enlarging their allegations as to standing. Pet. App. 19a. In its memorandum opinion the district court found that the First Amended Complaint sufficiently alleged standing and therefore denied petitioners' motion to amend as futile. Pet. App. 16a, 19a-27a. It then granted respondent's motion to dismiss the First Amended Complaint for failure to state a claim. Pet. App. 17a, 27a-56a. Respondent did not appeal as to standing. Amicus did not participate in the appeal.

was "entirely motivated" by a religious purpose, Pet. App. 7a, *quoting Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). It then reasoned that this requirement had not been met here because "the Complaint fails to allege that [respondent's] discussion of the phrase 'In God We Trust' as the national motto was a pretext for its religious motivation, and thereby fails to allege that there was no legitimate secular purpose to [respondent's] approval of the display." Pet. App. 7a-8a. That is, since petitioner had alleged that respondent had *discussed* that "In God We Trust" was the national motto, petitioner had thereby alleged that respondent had a secular purpose for its action; and since petitioner had not further alleged that this secular purpose was pretextual, perforce petitioner had not alleged that respondent was "entirely motivated" by a religious purpose. Once any secular purpose was alleged and then not also alleged to be pretextual, the first prong of *Lemon* had been satisfied, without respondent having to plead. Pet. App. 8a and n.2.[3]

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3. The First Amended Complaint had alleged that the fact that "In God We Trust" is the national motto had been "mentioned but not emphasized," *i.e.*, "discussed" during the enactment meeting, but did not allege by whom this was done, whether by respondent or by a member of the audience. Pet. App. 21a(w). The district court nevertheless stated that "[petitioners] concede that [respondent] discussed the fact that 'In God We Trust' was the national motto before approving its display . . . ," and that "this concession bespeaks [respondent's] secular purpose of acknowledging the official national motto." Pet. App. 60a. On appeal petitioners pointed out that the district court had misconstrued their allegation. "[Petitioners'] allegation does not say who mentioned the national motto, nor when in the course of the meeting this was said. It does not say how this information was received. It does not say that any Commissioner [of respondent] acted on this information or had it as a purpose." Petitioner's Reply Brief, at 15. The court of appeals nevertheless construed the allegation as being that *respondent* had discussed the matter. Pet. App. 7a-8a and n.2.

Having held that petitioner had not alleged that respondent was entirely motivated by religious purposes, the court of appeals accordingly did not evaluate the allegations that respondent intended to affix a prominent religious message to its seat of government, that the religious nature of the display was emphasized at the enactment meeting, and that one Commissioner opined that a vote against the display would be seen as a vote against God. And, having held that the endorsement test did not apply to the assessment of secular purpose, it also did not evaluate the allegations that as and where installed the display conveyed a religious message to almost all who saw it, that the words were not identified as the national motto either inside or outside the building, and that no contrary or impeaching message would be allowed.

REASONS FOR GRANTING THE WRIT

This case is controlled by *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. ___, 125 S. Ct. 2722 (2005).[4] Both this case and *McCreary County* involve governmental displays of religious creeds.

The circuit court acknowledged that the display of "In God We Trust" on a main county building, unidentified as the national motto, was "governmental action which goes beyond the traditional uses of the phrase." Pet. App. 10a. Petitioners alleged that it "convey[ed] a religious message to almost all readers." Pet. App. 59a(p). "In God We Trust" is the national motto but it is also a religious creed, a statement of communal religious belief. It is as or more religious than, for example, the opening of the Apostles'

4. *McCreary County* was handed down after the time for petitioning for rehearing or rehearing *en banc* had expired.

Creed ("I believe in God . . ."). The exact origin of the phrase is not known, but it calls to mind the words of the Prophet Job who, despite all the plagues (and comforters) that God visited on him, never wavered in his trust in God. "Though he slay me, yet will I trust in him." Job 13:15 (King James Version).

McCreary County would control even if "In God We Trust" were taken to be an entirely patriotic or historical statement, because a religious purpose can exist in the absence of a religious statement. The Alabama moment-of-silence law was not a religious statement, but it was held unconstitutional because the motive for its enactment was religious. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

The ruling below is twice inconsistent with *McCreary County*.

First, *McCreary County* ruled that the first prong of *Lemon* requires only an "ostensible and predominant purpose of advancing religion," 545 U.S. ___, 125 S. Ct. at 2735, not an entirely religious purpose. A "primary" or a "preeminent" purpose to advance religion is sufficient to state a claim. 545 U.S. ___, 125 S. Ct. at 2735, *quoting Edwards v. Aguillard*, 482 U.S. 578, 594 (1987); *Id.*, n.13.[5] The court of appeals held, to the contrary, that the purpose had to be entirely religious for the test to be violated. ("[W]e will deem the first prong of the *Lemon* test to be contravened only if the action is entirely motivated by a purpose to advance religion.") Pet. App. 7a (quotation marks and brackets and citations omitted).

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5. This Court specifically discussed *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985), on which the court of appeals had relied for its entirely-motivated-by-religion rule, Pet. App. 7a, and decided that it did not so hold. 545 U.S. ___, 125 S. Ct. at 2736.

Second, this Court held in *McCreary County* that the endorsement test applied to the assessment of secular purpose, 545 U.S. ___, 125 S. Ct. at 2736-37 ("[T]he Counties . . . want an absentminded objective observer . . ."), and that the history and context of governmental action were to be considered in applying the endorsement test. "[R]easonable observers have reasonable memories." 545 U.S. ___, 125 S. Ct. at 2737.[6] The circuit court held directly to the contrary on both points. It held that the endorsement test did not apply to the determination of purpose (but is only "an enhancement of *Lemon's* second prong", Pet. App. 5a), and in any event was to be applied only to the present effect of the display, not to the history of its evolution. Pet. App. 12a.

Each of these errors caused a wrong result.

First, in applying the "predominant purpose" test the *McCreary County* Court considered and evaluated the background events leading to the displays, including legislative actions, the previous forms of display that had been authorized, the failure to repeal a prior resolution, and the fact that one county executive had been accompanied at the installation ceremony by his pastor who stated his belief in the certainty of the existence of God. 545 U.S. ___, 125 S. Ct. at 2738. Precisely this type evidence was alleged but not evaluated here: that the religious nature of the display was emphasized at the enactment meeting, that one Commissioner opined that a vote against the display would be seen as a vote against God, and that respondents intended to affix a prominent religious message to its seat of

6. Both of these points had been previously held in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000).

government.[7] Had these allegations been evaluated, as *McCreary County* requires, a claim would have been found to have been stated.[8]

Second, because it treated the endorsement test as not applicable to the determination of purpose, the court of appeals failed to consider how the allegations of secular purpose and of the history and development of the display would appear to an objective observer. Had it considered the several allegations of religious fervor at the enactment meeting, together with the allegations that "In God We Trust" as and where installed conveyed a religious message to almost all who saw it, that the words were not identified as the national motto either inside or outside the building, and that

7. The district court, although also adhering to the "entirely motivated" rule, separately analyzed each of these allegations. The allegation of intention to affix a prominent religious message was said "not [to] indicate that respondent's purpose was to endorse religion." Pet. App. 32a. Although there had been no discovery, let alone a trial, the district court improperly supported this conclusion by making the following findings of fact: Respondent's discussion of the religious nature of the display "at best, indicates only that the potential religious connotations of the display were addressed." Pet. App. 33a. The remark that a vote against the display would be seen as a vote against God did not "conclusively impart a religious motivation to the speaker" but only "reflect[ed] a secular concern that religious members of the constituency might perceive a vote against the display as adverse to their personal positions and preferences." Pet. App. 33a. These allegations nevertheless state a claim under the rule of *Hishon v. King and Spalding*, 467 U.S. 69, 104 S. Ct. 2229 (1984), that "any set of facts that could be proved consistent with the allegations" of the complaint must be accepted as true.

8. Even under its erroneous view of the law the court of appeals found that "a close question" was presented. Pet. App. 8a n.2.

no contrary or impeaching message would be allowed, it would have found that a claim had been stated.

The complaint states that "In God We Trust" over the door in Davidson County means that the Davidson County Government, like the Prophet Job, trusts in God come what may.

CONCLUSION

This Court should grant certiorari and summarily vacate the decision of the court of appeals to enable it to reconsider its ruling in light of this Court's decision in *McCreary County v. ACLU, supra.*

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MAY 13, 2005

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04-1753

CHARLES F. LAMBETH, JR.; MICHAEL D. LEA,

Plaintiffs-Appellants,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. William L. Osteen, District Judge.

Argued: Feb. 3, 2005

Decided: May 13, 2005

Before WIDENER and KING, Circuit Judges, and Henry F. FLOYD, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published opinion. Judge KING wrote the opinion, in which Judge WIDENER and Judge FLOYD joined.

Appendix A

OPINION

KING, Circuit Judge:

Plaintiffs Charles F. Lambeth, Jr. and Michael D. Lea appeal the district court's dismissal of their complaint in this civil action for failure to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Plaintiffs have alleged, pursuant to 42 U.S.C. § 1983, that the Board of Commissioners of Davidson County, North Carolina (the "Board"), violated the Establishment Clause of the First Amendment when it authorized the phrase "In God We Trust" to be inscribed on the facade of the Davidson County Government Center (the "Government Center"). The district court, upon analyzing the Plaintiffs' allegations, concluded that they failed to assert a violation of the Establishment Clause, as measured by the test prescribed by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (the "*Lemon* test"). As explained below, we affirm.

I.

Plaintiffs Lambeth and Lea are lawyers who regularly practice in the Government Center, located in the City of Lexington, the county seat of Davidson County, North Carolina. On June 24, 2003, the Plaintiffs filed this civil action against the Board under § 1983, alleging a violation of the Establishment Clause of the First Amendment.[1] They

1. The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I. The Supreme Court has advised that this protection is (Cont'd)

maintain that, around December 31, 2002, the Board unconstitutionally decided to inscribe the national motto, "In God We Trust," on the Government Center (the "display"). According to the Plaintiffs, Board members and the public spoke both in favor of and against the proposed display at the crucial Board meeting, emphasizing the religious nature of the words "In God We Trust," and observing that the display depicted the national motto. The display has since been installed on the front facade of the Government Center in eighteen-inch block letters.

On August 21, 2003, the Board moved to dismiss the Plaintiffs' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. Soon thereafter, on September 15, 2003, the Plaintiffs filed their First Amended Complaint (the "Complaint"). On October 2, 2003, the Board filed another Rule 12(b)(6) motion, asserting that the Complaint was legally deficient and incorporating by reference the contentions made in the Board's initial motion to dismiss.

On May 25, 2004, the district court dismissed the Complaint, concluding that it failed to state a claim of a First Amendment violation on which relief could be granted. *Lambeth v. Bd. of Comm'rs,* No. 03-cv-592-WLO (M.D.N.C.

(Cont'd)

incorporated by the Fourteenth Amendment as a protection against establishment of religion by the states. *See Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion . . . [and][t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

May 25, 2004) (the "Memorandum Opinion"). In so ruling, the court determined that the allegations of the Complaint fail, under the *Lemon* test, to demonstrate a violation of the Establishment Clause. Memorandum Opinion at 706. The Plaintiffs have timely appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6). *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 772 (4th Cir.2003). Under controlling principles, a district court may dismiss a complaint for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In assessing a Rule 12(b)(6) issue, we accept as true the factual allegations of the challenged complaint, *see Zinermon v. Burch*, 494 U.S. 113, 118 (1990), and we view those allegations in the light most favorable to the plaintiff, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). On appeal, our inquiry is limited to whether the "pleadings adequately state a set of facts which, if proven to be true, would entitle [the plaintiff] to judicial relief." *Duckworth*, 332 F.3d at 772.

III.

A.

Under our precedent, the Establishment Clause issue presented here is properly analyzed (as the district court did in making its challenged ruling), under the *Lemon* test

enunciated by the Supreme Court. *See Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir.2003) (applying *Lemon* test to analysis of Establishment Clause challenge to state university's supper prayer). In *Lemon*, the Court considered a state statute benefitting parochial school teachers, and assessed the constitutionality of the statute by examining whether it satisfied three conditions: first, whether there was a secular purpose behind the statute; second, whether the statute's principal or primary effect was one that neither advanced nor inhibited religion; and third, whether the statute fostered an "excessive government entanglement with religion." 403 U.S. at 612-13. To pass muster under the Establishment Clause, a challenged government action must satisfy each of the *Lemon* test's three criteria. *Mellen*, 327 F.3d at 367. In *County of Allegheny v. American Civil Liberties Union*, the Court elaborated on the *Lemon* test by examining whether the governmental use of an object with religious meaning (there, a crèche) had the effect of "endorsing" religion. 492 U.S. 573, 593-94 (1989). As we recognized in *Mellen*, we have treated *County of Allegheny*'s "endorsement" test as an "enhancement of *Lemon* 's second prong." *See Mellen*, 327 F.3d at 370-71.

In this proceeding, the district court concluded that the Complaint failed to adequately allege that the display contravened any of the *Lemon* test's three prongs. First of all, the court determined, under the first prong, that the Complaint failed to allege an entirely religious purpose behind the Board's installation of the display. Memorandum Opinion at 22-24. Next, the court determined, under the second prong, that the display could not have the primary effect of advancing religion in the eyes of a reasonable,

informed observer. *Id.* at 24-37. Finally, the court concluded that the display of the national motto did not result in an "excessive entanglement" of government with religion, and thus that it did not contravene the third prong. *Id.* at 37-44.

On appeal, the Plaintiffs contend that the district court erred in its application of the *Lemon* test, and that the allegations of the Complaint are sufficient to proceed to discovery. They maintain that the Complaint alleges that the Board's "dominant" purpose in approving the display was religious, which, they contend, is sufficient to allege that the display fails the *Lemon* test's first prong; that the effect of the display is to advance or endorse religion, prohibited by the *Lemon* test's second prong; and that the display results in an excessive entanglement of government with religion, precluded by the *Lemon* test's third prong. Pursuant to *Lemon* and its progeny, we assess de novo the alleged constitutional defects of the display.

1.

We first assess, under prong one of the *Lemon* test, whether the Complaint sufficiently alleges that the Board's adoption of the challenged display lacked a secular intent. As the district court observed, the Complaint alleges that both secular and religious aspects of the display were discussed at the crucial Board meeting. Memorandum Opinion at 22-24. The Complaint alleges that Board members, and members of the public as well, "emphasized" at the Board meeting the religious nature of the phrase "In God We Trust," and that the display was thereafter

adopted. Complaint at ¶ 3(u)-(v). The Complaint further alleges that one Board member observed that voting against the installation of the display would be perceived by the public as a vote against God. *Id.* at ¶ 3(y). Finally, the Complaint also alleges that "the fact that these words are also the national motto was mentioned but not emphasized at the meeting at which defendant authorized the display." *Id.* at ¶ 3(w).

Although the Plaintiffs contend that their allegations are sufficient in this regard, we are constrained to disagree. Under applicable Supreme Court precedent, a "legitimate secular purpose" supporting a challenged governmental action will suffice to satisfy the *Lemon* test's first prong. *See Lynch v. Donnelly*, 465 U.S. 668, 681 (1984). And, as we have previously observed, the demonstration of such a legitimate secular purpose is "a fairly low hurdle." *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir.2001). Indeed, we will deem the first prong of the *Lemon* test to be contravened "only if [the action] is 'entirely motivated by a purpose to advance religion.' " *See Mellen*, 327 F.3d at 372 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

A legitimate secular purpose is thus sufficient to pass muster under the first prong of the *Lemon* test, unless the alleged secular purpose is in fact pretextual. *See Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308-09 (2000); *see also Stone v. Graham*, 449 U.S. 39, 41 (1980) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."). In this matter, the Complaint fails to allege that the Board's

discussion of the phrase "In God We Trust" as the national motto was a pretext for its religious motivations, and thereby fails to allege that there was no legitimate secular purpose to the Board's approval of the display. As a result, the display's installation, on the basis of allegations of the Complaint, does not contravene the *Lemon* test's first prong.[2]

2.

Turning to the *Lemon* test's second prong, we next assess whether the Complaint alleges that the display's principal or primary effect is to advance or inhibit religion, or whether the display has the effect of "endorsing" religion. In this regard, the Plaintiffs contend that the district court erred in concluding that the Complaint's allegations of the religious meaning and effect of the display fail to contravene the *Lemon* test's second prong. Again, we disagree.

a.

We have heretofore characterized the phrase, "In God We Trust," when used as the national motto on coins and

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2. The Plaintiffs contend that they are required to demonstrate an "entirely religious" purpose for the display only after discovery has been completed, rather than in their Complaint at the pleading stage. However, a complaint must contain a short and plain statement showing an entitlement to relief. Fed.R.Civ.P. 8(a). While the sufficiency of the Complaint's allegations presents a close question, the Plaintiffs have conceded in the Complaint that there was some secular purpose in the display, without alleging that the purported secular purpose was pretextual. The Plaintiffs have therefore failed to establish a dispute over the display's purpose that would justify discovery.

currency, as a "patriotic and ceremonial motto" with "no theological or ritualistic impact." *Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir.1991). The use of the challenged phrase as the national motto is long-standing, and it has been used extensively over the years by the federal government. By way of example, Congress first authorized the National Mint to include "In God We Trust" on coins in 1865, and made its inclusion mandatory on gold and silver coins in 1908. Its use was extended to the national currency in 1955. Importantly, Congress made "In God We Trust" the national motto in 1956, and the motto is inscribed above the Speaker's Chair in the House of Representatives, and also above the main door of the Senate Chamber.

The Supreme Court has strongly indicated on several occasions, albeit in dicta, that governmental use of the motto "In God We Trust," does not, at least in certain contexts, contravene the mandate of the Establishment Clause. *See County of Allegheny*, 492 U.S. at 602-03 ("[O]ur previous opinions have considered in dicta the ['In God We Trust'] motto . . . , characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief."); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) ("[G]overnment's display of the crèche in this particular physical setting [is] no more an endorsement of religion than such governmental 'acknowledgments' of religion as . . . [the] printing of 'In God We Trust' on coins. . . ."). Such observations by the Court, interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive

value in the inferior courts. *See Garris v. Norfolk Shipbldg. & Drydock Corp.*, 210 F.3d 209, 227 (4th Cir.2000) (Hall, J., concurring) (observing that Court's interpretation of its own opinion is persuasive).

As the Plaintiffs properly recognize, however, the County's installation of the national motto on the facade of the Government Center constitutes a governmental action which goes beyond the traditional uses of the phrase, as discussed in the Court's dicta and by our precedent, which have been limited to the phrase's appearance on coins and currency, and as the national motto. Plaintiffs urge that, no matter how the challenged phrase is viewed in its use on coins, currency, and in other long-standing contexts, such uses are inapposite to the Board's display here—only recently installed on the Government Center. As a result, the Plaintiffs urge us to view the Board's use of the phrase on a blank slate. And, they contend, when viewed in that light, an objective observer would understand the Board's display of this "religious creed" as an unconstitutional endorsement of religion.

Plaintiffs' contention on this point, however, slightly mischaracterizes the analysis required under the *Lemon* test's second prong. It suggests that anything not wholly secular contravenes the Establishment Clause, unless it has been specifically "grandfathered" by longstanding use. The proper analysis is the converse: whether a particular display, with religious content, would cause a reasonable observer to fairly understand it in its particular setting as impermissibly advancing or endorsing religion. *See County of Allegheny*, 492 U.S. at 598-600. As the Supreme Court observed in

Lynch, to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." 465 U.S. at 680. Instead, the Court has consistently concluded that displays with religious content—but also with a legitimate secular use—may be permissible under the Establishment Clause. *See, e.g., County of Allegheny*, 492 U.S. at 579 (concluding that display of menorah did not violate Establishment Clause).

In this situation, the reasonable observer must be deemed aware of the patriotic uses, both historical and present, of the phrase "In God We Trust." *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) ("'[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]'") (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring)). As a result, we are obliged to assess the Board's use of the national motto on the facade of the Government Center in its full context—as a statement with religious content, and as one with legitimate secular associations born of its consistent use on coins and currency, and as the national motto. The question under the *Lemon* test's second prong is whether, taking these associations into account, the display's principal or primary effect is to advance or inhibit religion; or, put differently, whether an informed, reasonable observer would view the display as an endorsement of religion. We now turn to an assessment of that question.

The Plaintiffs maintain that, in making this analysis under the *Lemon* test's second prong, we must consider the reasonable observer to be aware of the religious comments made in favor of the display at the Board meeting where it was authorized. However, as the district court determined, the allegations of the Complaint on the Board's intent are inapplicable to the *Lemon* test's second prong. The first and second prongs of the *Lemon* test are intended to assess different aspects of a challenged government action. Prong one of the *Lemon* test looks at the purpose behind such an action, and allows the action to stand if it is not "entirely motivated by religion." *Mellen*, 327 F.3d at 372. Prong two, by contrast, assesses the effect of the action, *Lemon*, 403 U.S. at 612-13, and inquires "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion]," *Mellen*, 327 F.3d at 373 (quoting *Wallace*, 472 U.S. at 56 n. 42). Prong two thus looks to the effect of the display itself, not to the display's origin. *See Constangy*, 947 F.2d at 1151 (explaining that, under the *Lemon* test's second prong, "intent is irrelevant").

With these principles in mind, we are constrained to conclude, under the *Lemon* test's second prong, that the installation of the national motto "In God We Trust" on the Government Center would not cause a reasonable observer to fairly understand the purpose of the message "in its particular physical setting" to impermissibly advance or endorse religion. *County of Allegheny*, 492 U.S. at 598-00; *see also Good News Club*, 533 U.S. at 119 (emphasizing

that Establishment Clause does not create a "heckler's veto"). The Complaint alleges no circumstances—such as an inappropriate context or character—to negate the legitimate secular connotations arising from the long-standing patriotic uses in this country of the phrase "In God We Trust." A reasonable observer contemplating the inscription of the phrase on the Government Center would recognize it as recently installed, but also as incorporating familiar words—a phrase with religious overtones, to be sure, but also one long-used, with all its accompanying secular and patriotic connotations as our national motto and currency inscription. In this setting, we thus conclude that the Board's use of the national motto in the challenged display does not contravene the *Lemon* test's second prong.

3.

Finally, we are obliged to assess, under the *Lemon* test's final prong, whether the Complaint sufficiently alleged that the challenged display has created an "excessive entanglement" between government and religion. In this regard, Plaintiffs contend that the district court erroneously declined to consider their allegations of "political divisiveness," which they deem to be pertinent to the issue of "excessive entanglement."

The type of "divisive political potential" which the Supreme Court has identified as a concern under the Establishment Clause is "political division along religious lines." *Lemon*, 403 U.S. at 622. And, as we recognized in *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, the Court has confined its "political divisiveness" rubric to

"'cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.'" 224 F.3d 283, 292 (4th Cir.2000) (quoting *Mueller v. Allen*, 463 U.S. 388, 403-04 n. 11 (1983)). The Court's "political divisiveness" rubric is thus inapplicable to the circumstances of this case.

Moreover, there are no other apparent grounds, either alleged in or arising from the Complaint, on which to find an "excessive entanglement" between government and religion in this case that would contravene the *Lemon* test's third prong. The kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by "comprehensive, discriminating, and continuing state surveillance" of religious exercise, *see Lemon*, 403 U.S. at 619, which is simply not present here. The display on the Government Center does not require pervasive monitoring or other maintenance by public authorities. *See Mueller*, 463 U.S. at 403 (explaining that such comprehensive surveillance is "necessary [for a challenged action] to run afoul of" *Lemon*'s third prong); *see also Agostini v. Felton*, 521 U.S. 203, 233-34 (1997) (concluding that program of sending public school teachers into parochial schools to provide remedial education to disadvantaged children did not result in excessive entanglement). Nor does the display require any other sort of continued and repeated government involvement with religion. *See Mellen*, 327 F.3d at 375 (determining that public university's supper prayer violated *Lemon*'s third prong because school officials "composed, mandated, and monitored a daily prayer"). As a result of the foregoing, we must also conclude that the display does not contravene the *Lemon* test's third prong.

B.

In sum, even accepting the allegations of the Complaint as true, the display does not contravene any of the three prongs of the *Lemon* test. The Complaint fails to sufficiently allege that the display had no legitimate secular purpose; that it has the effect of advancing or endorsing religion; or that it results in an excessive entanglement of government and religion. As a result, we agree with the comprehensive analysis made by the district court with regard to this dispute, *see* Memorandum Opinion at 18-44, and conclude that the Complaint fails to state a claim for relief under the Establishment Clause upon which relief can be granted.

IV.

Pursuant to the foregoing, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B — ORDER AND JUDGMENT AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA FILED MAY 25, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:03 CV 00592

CHARLES F. LAMBETH, Jr. and MICHAEL D. LEA,

Plaintiffs,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Defendant.

ORDER AND JUDGMENT

OSTEEN, District Judge

For the reasons stated in the memorandum opinion filed this same day,

IT IS ORDERED that Plaintiffs Charles F. Lambeth, Jr. and Michael D. Lea's Motion for Leave to File and Serve Second Amended Complaint [19] is DENIED.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant Board of Commissioners of Davidson County's Motion to Dismiss Plaintiffs' First Amended Complaint [10] is GRANTED.

This the 25 day of May, 2004.

s/ [illegible]
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

No. 1:03 CV 00592

CHARLES F. LAMBETH, Jr. and MICHAEL D. LEA,

Plaintiffs,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Defendant.

MEMORANDUM OPINION

OSTEEN, District Judge.

Plaintiffs Charles F. Lambeth, Jr. and Michael D. Lea bring this action against Defendant The Board of Commissioners of Davidson County ("the Board") pursuant to 42 U.S.C. § 1983 claiming a violation of the Establishment Clause of the First Amendment to the United States Constitution. This matter is now before the court on Plaintiffs' Motion for Leave to File and Serve Second Amended Complaint and the Board's Motion to Dismiss Plaintiffs' First Amended Complaint for failure to state a claim upon which relief may be granted.

Appendix B

I. BACKGROUND

Plaintiffs, two attorneys who live and practice law in Davidson County, North Carolina, filed this action claiming that the inscription "In God We Trust" appearing on the Davidson County Governmental Center violates the Establishment Clause. The Board, having approved the installation of the display, refutes Plaintiffs' claim and moved to dismiss. Plaintiffs filed a First Amended Complaint, thereby superceding their original complaint. The Board subsequently moved to dismiss the First Amended Complaint relying entirely upon and incorporating by reference the arguments presented in its original motion to dismiss.

Several past members of the Board who held office at the time the display was approved filed an amicus curiae brief in support of the Board. In that brief, Amici argued that Plaintiffs lack standing to bring this constitutional challenge. In response, Plaintiffs moved to amend their complaint a second time. The Board and Amici both opposed that motion on the ground that such an amendment would be futile.

Currently before the court are Plaintiffs' motion to amend their First Amended Complaint and the Board's motion to dismiss Plaintiffs' First Amended Complaint.

II. ANALYSIS

A. Plaintiffs' Motion for Leave to File and Serve a Second Amended Complaint

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleadings "once as a

matter of course" and again "only by leave of court ... and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir.1987). Since Plaintiffs have already filed a First Amended Complaint, they have properly moved for leave to file and serve a Second Amended Complaint.

Plaintiffs' proposed amendments are intended solely to "amplify their allegations as to their standing." (Pls.' Br. Supp. Second Am. Compl. at 2.) Since the amendments do not serve any further purpose, *see id.* at 7-8, the question for this court is whether Plaintiffs have adequately alleged standing in the First Amended Complaint. If that question can be answered in the affirmative, then Plaintiffs' amendment must be viewed as futile and disallowed. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962) (stating that "futility of amendment" is sufficient reason to deny leave to amend a complaint).

In the First Amended Complaint, it is alleged that "Plaintiffs are each licensed attorneys who live and practice law in Davidson County, North Carolina. Each has contact with the display in the course of his professional activities in the county. Each is offended by the display, which is to him a religious statement by the County government." (First Am. Compl. ¶ 5.) Whether this allegation is sufficient to confer standing will necessarily depend on the nature of cognizable injuries recognized by Establishment Clause cases. *See Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir.1997). "It has been repeatedly noted that 'the concept of injury for standing purposes is particularly elusive in Establishment Clause cases.'" *Id.* (quoting *Murray v. City of*

Austin, 947 F.2d 147, 151 (5th Cir.1991)); *see also Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir.1987); *ACLU of Ill. v. City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir.1986); *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1102-03 (11th Cir.1983).

The Supreme Court has noted that neither an individual's strong spiritual convictions nor vehement opposition to perceived state-sponsored religious expression gives rise to an injury-in-fact. *See Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486, 102 S.Ct. 752, 766 (1982). As such, Plaintiffs' allegation that they are distressed by the display, taken alone, "is not a permissible substitute for the showing of injury itself." *Id.* ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy."); *Suhre*, 131 F.3d at 1086.

Although mere outrage or offense is not sufficient to confer standing, intangible injuries may be justiciable in Establishment Clause cases. Amici note that Plaintiffs have not asserted "any economic loss, discrimination, coercion, or any actual harm to them except their personal offense." (Amicus Curiae Br. Supp. Def. at 4.) It is well-settled, however, that Plaintiffs' standing may be predicated on non-economic injury. *See Valley Forge*, 454 U.S. at 486, 102 S.Ct. at 766; *accord United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-88, 93 S.Ct. 2405, 2415-16 (1973); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-54, 90 S.Ct. 827, 830 (1970); *Smith v. County of Albemarle*, 895 F.2d 953, 955 (4th Cir.1990). Allegations of discriminatory

or coercive treatment are also not required; plaintiffs may, for example, assert aesthetic harm and establish standing. *See, e.g., SCRAP,* 412 U.S. at 686, 93 S.Ct. at 2415; *Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1366 (1972).

Furthermore, Plaintiffs need not allege that they changed their conduct to avoid contact with the offensive display. *See School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 224-25 & n. 9, 83 S.Ct. 1560, 1573 & n. 9 (1963) (stating that standing to challenge Bible readings in public school was not "mitigated by the fact that individual students [could] absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause"); *accord Suhre,* 131 F.3d at 1088 ("In evaluating standing, the Supreme Court has never required that Establishment Clause plaintiffs take affirmative steps to avoid contact with challenged displays or religious exercises."). As such, Plaintiffs' purported injury is not lessened by their failure to allege economic harm, changed behavior, or any other quantifiable adverse impact caused by the display at issue.

The question, then, is whether Plaintiffs can assert a justiciable injury simply by stating their offense at the display in conjunction with their standing in the community. In *Valley Forge,* the Supreme Court declined to find standing when the respondents "fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485, 102 S.Ct. at 765 (emphasis

omitted). The Court reasoned that allegations of offense at a claimed Establishment Clause violation would not, absent any personal connection to the state action, give rise to standing. *Id.* at 486-87, 102 S.Ct. at 766. In this case, Plaintiffs have similarly alleged a primarily psychological injury, claiming that "[e]ach [Plaintiff] is offended by the display, which is to him a religious statement by the County government." (First Am. Compl. ¶ 5.)

Plaintiffs, however, have additionally stated that they are "each licensed attorneys who live and practice law in Davidson County, North Carolina. Each has contact with the display in the course of his professional activities in Davidson County." (*Id.*) This allegation distinguishes Plaintiffs from the respondents addressed in *Valley Forge*. In that case, the Court took issue with the respondents' tangential connection to the state action at issue. "Respondents complain[ed] of a transfer of property located in [Pennsylvania]" although they "reside[d] in Maryland and Virginia [and] their organizational headquarters [were] located in Washington, D.C." *Valley Forge*, 454 U.S. at 486-87, 102 S.Ct. at 766 (noting that the respondents "learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court."). Plaintiffs have clearly alleged a much closer connection to the display at issue, stating that they conduct both their personal and professional lives in the county where the display is located and alleging that they come into contact with it on a regular basis.

In *Suhre*, the Fourth Circuit also distinguished *Valley Forge* on this ground. In that case, a display of the Ten Commandments appearing in Haywood County's Courthouse was challenged as violative of the Establishment Clause. 131 F.3d at 1085. The plaintiff was a frequent litigant and activist in the community, but had suffered no economic injury nor changed his behavior to avoid the display. *Id.* He alleged only that he was "filled with revulsion" when viewing the display. *Id.* Regardless, the Fourth Circuit found that the plaintiff had standing to bring his Establishment Clause claim. As that court noted, "personal contact with state-sponsored religious symbolism is precisely the injury that was sufficient to confer standing in *School District of Abington v. Schempp.*" *Id.* at 1086. After reviewing *Schempp* and *Valley Forge*, the Fourth Circuit determined that standing was denied in *Valley Forge* only because the respondents "had absolutely no personal contact with the alleged establishment of religion." *Id.* Other circuits have adopted a similar interpretation of *Valley Forge*, concluding that standing may be premised upon personal encounters with offending displays. *See, e.g., Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir.1991); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir.1989); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir.1987); *Hawley v. City of Cleveland*, 773 F.2d 736, 740 (6th Cir.1985). *But cf. Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1468 (7th Cir.1988) (holding that residents did not have standing to challenge a Ten Commandments display in a city park because they did not allege that they changed their behavior as a result).

Further, "where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie." *Suhre*, 131 F.3d at 1087; *accord Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 683 (6th Cir.1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."); *Saladin*, 812 F.2d at 693 ("The plaintiffs here, unlike the plaintiffs in *Valley Forge*, clearly have more than an abstract interest in seeing that the [city] observes the Constitution: they are part of the [c]ity and are directly affronted by the presence of the allegedly offensive word on the city seal."). The Fourth Circuit also recognized that religious displays in public buildings can produce a more pronounced injury than would other types of alleged Establishment Clause violations. *Suhre*, 131 F.3d at 1087 ("The spiritual affront of unwelcome contact with religious symbolism may also be compounded when the display that causes distress is located within a public facility."). The court reasoned that such displays "may seem more in the nature of endorsements and may potentially impair the use of the affected facilities by individuals who harbor strong objections to a religious message." *Id.* The Fourth Circuit concluded that the plaintiff in *Suhre* had standing since he was a frequent litigant and active member of the community who came into regular contact with a display he perceived to be a government endorsement of religion in a public building.

The facts sufficient to establish standing in *Suhre* parallel the Plaintiffs' allegations in this case. Where, in *Suhre*, the plaintiff alleged revulsion, Plaintiffs here have alleged their offense at viewing a perceived government endorsement of

religion. Where, in *Suhre*, the plaintiff was often exposed to the courthouse display due to his frequent status as a litigant, Plaintiffs here allege that they have regular contact with the challenged display due to their status as attorneys practicing and residing in Davidson County. Where, in *Suhre*, the plaintiff was held to have standing based on his abhorrence of and regular contact with a Ten Commandments display in a public courthouse, so too should Plaintiffs here have standing based on their offense at and regular contact with the statement "In God We Trust" displayed on a government building.

By alleging that they are offended by a perceived government expression of religion which appears in a location where each has regular personal and professional contact with it, Plaintiffs have sufficiently demonstrated standing to challenge a potential Establishment Clause violation.[1] This holding is in accord with the Fourth Circuit's

1. Amici further urge that Plaintiffs lack standing because their injury is redressable through the legislative process. Amici state, "[t]he representatives of the people of Davidson County voted to put 'In God We Trust' on the Davidson County Government Building and they can vote to take it down." (Amicus Curiae Br. Supp. Def. at 8.) Although courts should be mindful of impinging areas more appropriately addressed by legislative bodies, Amici's reasoning would allow incumbent government officials to commit ongoing constitutional violations until such time as a majority of constituents saw fit to elect alternative representation.Separation of powers concerns simply do not support Amici's contention and, as Plaintiffs correctly note, it is the clear province of federal courts to determine whether a federal constitutional violation has occurred once a complaining party has alleged an injury-in-fact. *See generally, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80, 2 L.Ed. 60, 71-77 (1803).

reading of *Valley Forge* and avoids the adoption of "a restrictive rule of standing [that] shuts the door on the meritorious and nonmeritorious alike." *Suhre*, 131 F.3d at 1091. Accordingly, Plaintiffs have demonstrated a cognizable injury-in-fact on the basis of their First Amended Complaint.

As noted above, Plaintiffs' proposed Second Amended Complaint is offered for the single purpose of enhancing their allegations related to standing. Since Plaintiffs have standing to pursue their claim based on the allegations contained in the First Amended Complaint, their motion to allow the Second Amended Complaint is futile. *Glendale Neighborhood Ass'n v. Greensboro Hous. Auth.*, 956 F.Supp. 1270, 1277 (M.D.N.C.1996) (determining that the plaintiff's standing was established on the basis of current allegations and, therefore, disallowing as futile an amended complaint intended strictly to bolster the plaintiff's standing). For that reason, the court will deny Plaintiffs' motion for leave to file and serve the Second Amended Complaint.

B. The Board's Motion to Dismiss Plaintiffs' First Amended Complaint

Motions to dismiss under Rule 12(b)(6) test the legal sufficiency of pleadings, but do not seek to resolve disputes surrounding the facts. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir.1992). A court must determine only if the challenged pleading fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). A pleading "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957). In considering a motion to dismiss, the pleading must be "liberally construed" in the light most favorable to the non-moving party and allegations made therein are taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849 (1969).

Plaintiffs have asserted that the display of the words "In God We Trust," on the front facade of the Davidson County Governmental Center, as approved by an official vote of the Board, violates the Establishment Clause of the First Amendment to the United States Constitution. This court must determine whether Plaintiffs have stated a claim under the Establishment Clause upon which relief may be granted.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. That prohibition impedes government establishment of religion "in the sense of 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir.2001) (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411 (1970)).

Plaintiffs allege that the display of "In God We Trust" on the Davidson County Governmental Center "states a religious message" and violates the Establishment Clause. (First Am. Compl. ¶ 3(o).) Such an assertion will fail to state a claim under the Establishment Clause if, as a matter of law, the display (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster excessive government entanglement with religion. *Mellen v. Bunting*, 327 F.3d 355,

367 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1750 (2004) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971)). This three-part analysis, now widely known as the *Lemon* test, was articulated by the Supreme Court in *Lemon v. Kurtzman* and has been applied by circuit courts in a variety of settings. *See, e.g., ACLU of Ky. v. McCreary County*, 354 F.3d 438, 445-46 (6th Cir.2003) (Ten Commandments displayed in courthouse and classrooms); *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir.), *cert. denied*, 124 S.Ct. 497 (2003) (display of Ten Commandments in judicial building); *Briggs v. Mississippi*, 331 F.3d 499, 505 (5th Cir.2003) (state flag incorporating Confederate battle flag and "St. Andrews Cross" or "Southern Cross"); *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247, 256 & n. 4 (3rd Cir.2003) (Ten Commandments plaque on front facade of courthouse); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir.2001) (Ten Commandments monument on statehouse grounds); *Alvarado v. City of San Jose*, 94 F.3d 1223, 1231 (9th Cir.1996) (sculpture of Quetzalcoatl, the "Plumed Serpent" of Aztec mythology, installed and maintained by municipality); *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 (10th Cir.1995) (city seal incorporating Latin or Christian cross).

The *Lemon* test has also been the analysis primarily applied by the Fourth Circuit when considering Establishment Clause cases. *Mellen*, 327 F.3d at 370 ("During the past decade, we have emphasized that the *Lemon* test guides our analysis of Establishment Clause challenges."); *Brown*, 258 F.3d at 275; *Koenick v. Felton*, 190 F.3d 259, 264 (4th Cir.1999) ("'[U]ntil the Supreme Court overrules

Lemon and provides an alternative analytical framework, this Court must rely on *Lemon* in evaluating the constitutionality of legislation under the Establishment Clause.'" (quoting *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1343 n. 11 (4th Cir.1995))). However, the Supreme Court has also articulated another analysis, known as the endorsement test, which focuses on the perception of a reasonable observer in determining whether government action can be understood as an endorsement of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 687-89, 104 S.Ct. 1355, 1367-68 (1984) (O'Connor, J., concurring); *Mellen*, 327 F.3d at 370. The Fourth Circuit used that analysis in conjunction with the *Lemon* test in a case involving institutionalized prayer. *See Mellen*, 327 F.3d at 371 (noting the special problem of government coercion to religious worship inherent in school prayer cases and consequently deciding to treat the endorsement test "as a refinement of *Lemon*'s second prong"); *see also Adland v. Russ*, 307 F.3d 471, 479 (6th Cir.2002), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1909 (2003) (treating "the endorsement test as a refinement of the second *Lemon* prong"). Although the case at bar does not involve prayer, this court will consider the endorsement test as an enhancement of *Lemon*'s second prong; applying that analysis will ensure that any coercion associated with the "In God We Trust" display has been given an appropriate level of consideration.[2]

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2. It is clear that the *Lemon* test is the Establishment Clause analysis applied most frequently in the Fourth Circuit. Nonetheless, out of an abundance of caution, this court will also consider the endorsement test when evaluating the second prong of the *Lemon*

(Cont'd)

Appendix B

1. Secular Purpose

Application of the *Lemon* test demands that the Board present a secular motivation for their installation of the "In God We Trust" display. The Supreme Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S.Ct. 1355, 1362 (emphasis added); *accord Bowen v. Kendrick*, 487 U.S. 589, 602, 108 S.Ct. 2562, 2570 (1988); *see also Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489-90 (1985) (invalidating a statute that "had *no* secular purpose" and noting that "even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion" (internal citation omitted)). The Court has noted that government action with a secular purpose has been upheld "[e]ven where the benefits to religion were substantial." *Lynch*, 465 U.S. at 680, 104

(Cont'd)

analysis, as the Fourth Circuit did in *Mellen* v. *Bunting*, 327 F.3d 355, 367 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1750 (2004). If Plaintiffs have failed to state a claim under this refined *Lemon* test, then they would also have failed to state a claim under the basic *Lemon* test. Taking into account the principles articulated by the endorsement test, while simultaneously considering *Lemon's* second prong, will allow this court to assure that the Board's motion to dismiss will only be granted if Plaintiffs have failed to state an Establishment Clause claim under either of the analyses applicable in the Fourth Circuit.

S.Ct. at 1362-63 (citing, as one example, *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 90 S.Ct. 1409 (1970), in which the Court concluded that it was constitutional for the Tax Commission to grant tax exemptions for properties owned and used solely for religious worship).

Accordingly, the Fourth Circuit has stated that "[i]n applying the first prong of the *Lemon* test . . . we need not find that the purpose be exclusively secular," such that government action "fails on this account when 'there is *no* evidence of a legitimate, secular purpose.'" *Brown v. Gilmore*, 258 F.3d 265, 276 (4th Cir.2001) (internal citations omitted) (quoting *Koenick v. Felton*, 190 F.3d 259, 265-66 (4th Cir.1999)). As such, in order to state a claim under the first prong of *Lemon*, Plaintiffs must assert that the Board had a purely religious purpose for approving the display.

To establish a religious motivation for the display, Plaintiffs allege that "[t]he [Board] intended that the installation of the display affix a prominent religious message to a government building" and "the religious nature of [the] words ['In God We Trust'] was repeatedly emphasized by some of the Commissioners of [the Board] who voted in favor of the installation of the display." (First Am. Compl. ¶ 3(r), (v).) Although these assertions are apparently meant to impart some impermissible purpose to the Board, they fail to do so. That the Board intentionally affixed a display to a government building which Plaintiffs believe to be a "prominent religious message" does not indicate that the Board's purpose was to endorse religion. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779, 115 S.Ct. 2440, 2455 (1995) (O'Connor, J., concurring in part and concurring in judgment)

("[B]ecause our concern is with the political community writ large, the endorsement inquiry is not about the perceptions of particular individuals or . . . isolated nonadherents . . . ." (internal citations omitted)). Nor is the Board's purpose revealed in an allegation that its members engaged in an extended discussion regarding "the religious nature" of the display. That allegation, at best, indicates only that potential religious connotations of the display were addressed by the Board; it does not indicate that the Board expressed endorsement of religion as a purpose of the display.

Plaintiffs put forth only one allegation that could be perceived as demonstrating a religious purpose, claiming, "One of the Commissioners who voted in favor of the installation of the display stated, at the meeting at which defendant authorized the display, that a vote against the installation would be perceived as a vote against God." (First Am. Compl. ¶ 3(y).) This statement, however, does not conclusively impart a religious motivation to the speaker. Rather, it reflects a secular concern that religious members of the constituency might perceive a vote against the display as adverse to their personal positions and preferences. It is unsurprising and irrelevant, from a constitutional standpoint, that one of the Commissioners was concerned about constituents' perceptions of the Board's vote. Taking Plaintiffs' allegation as true, the statement simply does not indicate that the speaker, much less the Board, intended to promote religion by approving the display.

Plaintiffs further allege that "the religious nature of the words ['In God We Trust'] was repeatedly emphasized by members of the public who spoke at the meeting at which

the [Board] authorized the display to be installed." (First Am. Compl. ¶ 3(u).) This assertion is not relevant to determining the Board's actual purpose in approving the display. *See Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 281 (4th Cir.1998) ("We do not impute an impermissible purpose to advance religion to an elected official merely because he responds to a religiously motivated constituent request . . . ."). This court is bound to consider only those allegations that impart an impermissible purpose to the Board itself, and, as discussed above, Plaintiffs' contentions do not establish that the Board was motivated by religious considerations.

Even if Plaintiffs' allegations could be construed as indicating that the Board sought to advance religion, such an assertion would not be sufficient to state a claim if the Board also held a secular purpose for its decision. *See, e.g., Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362; *Brown*, 258 F.3d at 276. That some benefit may be conferred to religion does not render a government action unconstitutional because the Establishment Clause has not been interpreted to demand a total separation of church and state. *See Brown*, 258 F.3d at 274; *see also Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 2959 ("[T]his Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation . . . ."); *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112 ("Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.").

In this case, Plaintiffs concede that the Board discussed the fact that "In God We Trust" was the national motto before approving its display on the Davidson County Governmental Center. (*See* First Am. Compl. ¶ 3(w).) Even when taken in the light most favorable to Plaintiffs, this concession bespeaks the Board's secular purpose of acknowledging the official national motto. This purpose, which Plaintiffs do not allege to be improper or counterfeit, is sufficient to satisfy the "fairly low hurdle" that is the first step of the *Lemon* test. The government action at issue was not "motivated wholly by religious considerations," *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362, and it cannot be said that "there is *no* evidence of a legitimate, secular purpose" for the Board's actions. *Koenick*, 190 F.3d at 265-66. Consequently, Plaintiffs have failed to adequately allege that the Board had a purely religious purpose in approving the display, as would be required to state a claim under the first prong of the *Lemon* Establishment Clause analysis.

Despite Plaintiffs' failure to show that the Board was entirely motivated by religious concerns, the Board's motion to dismiss will be denied if the Board's secular purpose is wholly overshadowed by the inherently religious nature of the display. Although the Fourth Circuit has observed that the "first prong of *Lemon* is 'a fairly low hurdle,'" *Brown*, 258 F.3d at 276 (quoting *Koenick*, 190 F.3d at 265-66), that court has also held that a challenged government action will not pass constitutional muster if the stated secular purpose is eclipsed by religious characteristics intrinsic to the conduct at issue.

For example, the Fourth Circuit has held that government action involving prayer and crèche displays violated the Establishment Clause even though a secular purpose was articulated for each. In *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, a district court held that it was unconstitutional for a state court judge to recite a prayer at the beginning of morning sessions. 947 F.2d 1145, 1150 (4th Cir.1991). Although the judge argued that the prayer served the secular purpose of solemnifying the proceedings, the Fourth Circuit affirmed the district court's finding that the actual purpose had been religious. *Id.* ("[C]ontrolling caselaw suggests that an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* test."); *see also Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1750 (2004) ("[T]he purpose of an official school prayer 'is plainly religious in nature.'" (quoting *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 194 (1980) (per curiam))).

Likewise, in *Hall v. Bradshaw*, the Fourth Circuit held unconstitutional a "motorist's prayer" that the North Carolina Department of Transportation printed on state maps it distributed free of charge. 630 F.2d 1018, 1020 (4th Cir.1980). Although the Department claimed the purpose of the prayer was to promote motorist safety, the court found that "[a] prayer . . . is undeniably religious and has, by its nature, both a religious purpose and effect" such that the government's circulation of the prayer violated the Establishment Clause. *Id.* at 1020. Similarly, in *Smith v. County of Albemarle*, the Fourth Circuit found the county's crèche display violated the Establishment Clause. 895 F.2d

953, 957-58 (4th Cir.1990). Although it based its holding primarily on the second prong of the *Lemon* analysis, the court likened the crèche display to the one at issue in *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 109 S.Ct. 3086 (1989) and found that the display was "indisputably religious." *Smith,* 895 F.2d at 957.

In this case, as will be discussed more thoroughly below,[3] the display of "In God We Trust" approved by the Board does not carry with it the same overtly religious connections as would government-mandated prayer or crèche displays. *See County of Allegheny,* 492 U.S. at 603, 109 S.Ct. at 3106 ("[T]here is an obvious distinction between crèche displays and references to God in the motto and the pledge."). The phrase "In God We Trust" is not inherently religious, particularly when considered in light of its history as this nation's official motto. That motto simply does not carry with it a clear endorsement of religious practice, as would a government prayer. Nor does it signify or convey concepts associated with a specific religion, as a crèche display would implicate Christian beliefs. Absent such an unquestionable tie to religious activity, the display of "In God We Trust" will only violate the Establishment Clause under *Lemon*'s first prong if the Board clearly lacked any secular purpose for approving its installation.

As set forth above, Plaintiffs failed to allege that the Board lacked a secular purpose and was instead motivated

3. Any religious connotations inherent to the phrase "In God We Trust" are more appropriately and exhaustively reviewed in this court's consideration of the second *Lemon* factor–that is, whether the display has the primary effect of endorsing religion.

by an impermissible desire to endorse religion.[4] Instead, Plaintiffs have merely alleged that the Board discussed the religious connotations of the display and how it would be perceived. When taken together with the legitimate secular purpose Plaintiffs attribute to the Board, these assertions are insufficient to state a violation of *Lemon*'s first prong. As such, Plaintiffs have failed to state a claim under the Establishment Clause on the basis that the Board lacked a secular purpose for displaying "In God We Trust" on the Davidson County Governmental Center.

2. Principal Effect

The court must next inquire as to whether the display at issue has the primary effect of advancing religion. *Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111. As noted above, this court will simultaneously address the endorsement test in this inquiry and, as such, must consider whether the display "suggests to a reasonable, informed observer that it is endorsing religion." *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1750 (2004) (citing *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J., concurring)). "'[T]he reasonable observer in the endorsement inquiry must be deemed aware' of the 'history and context' underlying a challenged program." *Zelman v. Simmons-Harris*, 536 U.S.

4. An impermissible motive will not be attributed to the Board absent such an allegation since courts "must be 'reluctan[t] to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner v. City of Sun Diego*, 1 F.3d 775, 782 (9th Cir.1993) (quoting *Mueller v. Allen*, 463 U.S. 388, 394, 103 S.Ct. 3062,3067 (1983)).

639, 655, 122 S.Ct. 2460, 2468-69 (2002) (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 121 S.Ct. 2093, 2106 (2001)); *accord Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S.Ct. 2266, 2278 (2000); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80, 115 S.Ct. 2440, 2455 (1995) (O'Connor, J., concurring in part and concurring in judgment).

Thus, the question is not "whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the Board] endorses religion." *Capitol Square*, 515 U.S. at 780, 115 S.Ct. at 2455 (O'Connor, J., concurring in part and concurring in judgment). Rather, the applicable observer is "similar to the 'reasonable person' in tort law, who is not to be identified with any ordinary individual, who might occasionally do unreasonable things, but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment." *Id.* at 779-80, 115 S.Ct. at 2455 (O'Connor, J., concurring in part and concurring in judgment) (alteration in original, quoting W. Keeton, et al., *Prosser and Keeton on Law of Torts* 175 (5th ed.1984)).

Under the endorsement test, the reasonable observer is presumed to know that "In God We Trust" is the national motto, that the Davidson County Governmental Center is owned by local government, and that the building is the seat of county government. *See id.* at 779-81, 115 S.Ct. at 2454-55 (O'Connor, J., concurring in part and concurring in judgment) ("[P]roper application of the endorsement test requires that the reasonable observer be deemed more

informed than the casual passerby . . . ."); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996) (determining that the endorsement test's "reasonable observer" would be aware of the "purpose, context, and history of the phrase 'In God we trust'"); *Schmidt v. Cline*, 127 F.Supp.2d 1169, 1178-79 (D.Kan.2000) (same); *see also Myers v. Loudoun County Sch. Bd.*, 251 F.Supp.2d 1262, 1274-75 (E.D.Va.2003), *appeal docketed*, No. 03-1364 (4th Cir. December 30, 2003)[5] (concluding that a reasonable person would not find the national motto's reference to God to be religious as opposed to secular). The reasonable observer would, thus, have at least some passing knowledge of the history of the phrase "In God We Trust" and its usage in this country. That history includes the adoption of the motto in 1956, *see* 36 U.S.C. § 302, and, in 1865, the first congressionally-authorized inclusion of the phrase on United States coins. Act of March 3, 1865, 13 Stat. 517, 518. That requirement was reaffirmed and extended over the years until 1955, when Congress mandated that the phrase appear on all coin and currency. *See* 31 U.S.C. §§ 5112, 5114. The motto appears in other conspicuous places of national significance including above the Speaker's Chair in the United States House of Representatives and above the main door of the United States Senate. *See ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir.2001) (en banc) (noting the inscription in the House of Representatives and stating, "the idea of any federal court having the temerity to

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5. This appeal was placed in abeyance while the Fourth Circuit awaits the Supreme Court's decision in *Elk Grove Unified School District v. Newdow*, No. 02-1624, 124 S.Ct. 384 (Oct. 14,2003), an appeal derived from the Ninth Circuit's decision in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir.2003).

order the inscription stricken from the nation's Capitol strikes us as ludicrous"); Act of November 13, 2002, Pub.L. No. 107-293 §§ 1(10), 2-3, 116 Stat.2057-61 (2002) (reaffirming "One Nation Under God" in the pledge, "In God We Trust" as the national motto, and noting that the motto appears "above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States").

With this history in mind, several federal appellate courts have considered the phrase "In God We Trust" and held that neither its use as the national motto nor its appearance on currency violates the Establishment Clause. *See Gaylor,* 74 F.3d at 216 (holding that "In God We Trust" as the national motto and printed on currency satisfies both the *Lemon* and the endorsement tests because "[t]he motto's primary effect is not to advance religion . . . through historical usage and ubiquity [it] cannot be reasonably understood to convey government approval of religious belief"); *Aronow v. United States,* 432 F.2d 242, 243 (9th Cir.1970) (concluding that "'In God We Trust' has nothing whatsoever to do with the establishment of religion" and noting that "[i]ts use [as a motto and on currency] is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise. . . . [I]t is excluded from First Amendment significance because [it] has no theological or ritualistic impact."); *see also O'Hair v. Blumenthal,* 462 F.Supp. 19, 20 (W.D.Tex.1978) ("[I]t is equally clear that the use of the motto on the currency *or otherwise* does not have a *primary* effect of advancing religion." (first emphasis added)), *aff'd per curiam sub nom. O'Hair v. Murray,* 588 F.2d 1144 (5th Cir.1979). Other appellate courts, though not directly presented with the question, have similarly

acknowledged that the motto does not violate the Establishment Clause. *See, e.g., Glassroth v. Moore,* 335 F.3d 1282, 1301 (11th Cir.), *cert. denied,* 124 S.Ct. 497 (2003); *Freethought Soc'y of Greater Philadelphia v. Chester County,* 334 F.3d 247, 264 (3rd Cir.2003); *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 780 (7th Cir.2001); *ACLU of Ohio,* 243 F.3d at 301.

A collective majority of Justices of the Supreme Court have also clearly stated that "In God We Trust" and similarly brief ceremonial references to a deity are not unconstitutional. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 322-23, 120 S.Ct. 2266, 2286 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.) (noting that the Establishment Clause does not prohibit singing the national anthem with its concluding verse "And this be our motto: 'In God is our trust'" at public school functions); *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 602-03, 109 S.Ct. 3086, 3106 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."); *id.* at 630-31, 109 S.Ct. at 3121 (O'Connor, J., concurring in part and concurring in judgment, joined by Brennan and Stevens, JJ.) (concluding that the "history and ubiquity" of longstanding government practices, "such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,'" would "not convey a message of endorsement" to a reasonable observer "despite [the practices'] religious roots"); *id.* at 657, 109 S.Ct. at 3135 (Kennedy, J., concurring in part and dissenting in

part, joined by Rehnquist, C.J., White and Scalia, JJ.) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."). Although these pronouncements are properly categorized as dicta, they are of "considerable persuasive value" to lower courts. *United States v. Fareed*, 296 F.3d 243, 247 (4th Cir.2002) (citing *Gaylor*, 74 F.3d at 217 (stating that federal appellate courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements")).

The Fourth Circuit has also opined that "'In God We Trust,' on coins or the announcement made when many courts are opened, 'God save the United States and this Honorable Court'" are "brief references to God" that "are merely examples of 'ceremonial deism.'" *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir.1991) (quoting *County of Allegheny*, 492 U.S. at 630, 109 S.Ct. at 3121 (O'Connor, J., concurring)) (distinguishing prayers led by a judge in open court from the national motto and similar phrases because "these brief references to God have been repeated so often that their religious meaning has diminished"). The decisions of other circuits holding that the national motto is constitutional have also been looked on with favor in this circuit, which has noted that "[t]he words, 'In God We Trust,' on coin and currency have been upheld as a 'patriotic and ceremonial' motto with 'no theological or ritualistic impact.'" *Id.* (quoting *Aronow*, 432 F.2d at 243). Though not called on to answer the question

itself, the Fourth Circuit has clearly indicated that the national motto is constitutional:

> The history of this nation has been identified with religion, and our ceremonies and public rituals reflect that '[w]e are a religious people whose institutions presuppose a Supreme Being.' References to the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect this fact of our history and no longer have any potentially entangling theological significance.... In a very real sense [these references] may be treated as 'grandfathered' exceptions to the general prohibition against officially composed theological statements. . . . Their singular quality of being rooted in our history and their incapacity to tempt competing or complementary theological formulations by contemporary agencies of government sufficiently cabin them in and distinguish them from new, open-form theological expressions published under the aegis of the state.

Hall v. Bradshaw, 630 F.2d 1018, 1022-23 & n. 2 (4th Cir.1980) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684 (1952)).

Although the phrase "In God We Trust" appears to be widely accepted as constitutional when employed as the national motto or printed on currency, it is not clear that these words may be engraved on an otherwise largely unadorned

local government building. Plaintiffs correctly assert that there are important contextual differences between prior Fourth Circuit and Supreme Court pronouncements, which solely addressed the motto and its appearance on currency, and the case at bar. As Plaintiffs note, the motto's "use on coin and currency presents a context in which their ubiquity and busy facades make the religious message much less prominent." (Pls.' Resp. Def.'s Mot. Dismiss at 12.)

Despite this distinguishing factor, two other courts have had occasion to consider local government displays of the national motto and found that these displays were constitutional. In *Schmidt v. Cline,* a district court considered a poster displayed by the county treasurer and bearing the words "In God We Trust" along with a "barely visible" reference identifying the phrase as the national motto. 127 F.Supp.2d 1169, 1171 (D.Kan.2000). Applying the *Lemon* test, the court concluded that, although the plaintiffs alleged numerous religious motivations, they failed to allege that the defendant lacked any secular purpose for the display. *Id.* at 1179. Relying on *Gaylor,* the court noted that the national motto was not unconstitutional under either the *Lemon* or the endorsement test and, as such, the posters could not be perceived by a reasonable observer as endorsing religion. *Id.* at 1178-79. As such, the court held that the plaintiffs failed to state a claim because the posters did not violate the Establishment Clause. *Id.* at 1180.

In *Myers v. Loudoun County School Board,* a district court considered a constitutional challenge to a public school district's implementation of a Virginia statute that required schools to post the national motto. 251 F.Supp.2d 1262, 1264

(E.D.Va.2003), *appeal docketed,* No. 03-1364 (4th Cir. December 30, 2003). The court found that displaying the posters, which showed the American flag and the text "In God We Trust: The National Motto Enacted by Congress in 1956," did not violate the Establishment Clause even though the posters were donated by a religious group. *Id.* at 1274-75. Relying on *Gaylor* and *Aronow,* the court determined that "the posters at issue [were] secular and not religious" and further stated that "absent any allegation that the poster contains any objectively religious theme, the court may not infer that because the designers may have been religiously motivated, that the design itself is religiously themed." *Id.* Concluding that the posters did not violate the Establishment Clause, the court granted the defendants' motion to dismiss. *Id.* at 1275.

Although *Schmidt* and *Loudoun* are instructive, the posters at issue in those cases involved important differences from the display considered here. Whereas the posters were hung on the interior of government buildings, the display at issue in this case appears on the exterior of the Davidson County Governmental Center. The display approved by the Board is also more prominent, featuring only the name of the building and the words "In God We Trust." By contrast, the posters in *Schmidt* and *Loudoun* incorporated "In God We Trust" as part of a larger poster design and identified the phrase as the national motto. The display at issue here lacks any such identification.

These distinctions, however, are not sufficient to compel a different result in this case. Although the display at issue here is not expressly identified as the national motto, the

reasonable observer would be aware that "In God We Trust" is this country's slogan. Further, it appears that the display approved by the Board is not more likely to be perceived as an endorsement of religion simply because it is more prominently displayed than were the posters at issue in *Loudoun* and *Schmidt*.[6]

The absence of commemorative ceremonies or explicit references to religion, also absent in *Loudoun* and *Schmidt*, further mitigates against finding that the display of "In God We Trust" could be considered a religious endorsement. Plaintiffs allege that "[n]o governmental ceremony marking the display was held at its installation. No governmental ceremony marking the display has been held since its installation." (First Am. Compl. ¶ 3(h).) By this assertion, Plaintiffs assert that the lack of a commemorative ceremony increases the likelihood that the display could be perceived as endorsing religion. However, since no ceremony was ever held, no government endorsement could have been conveyed at such an event; the absence of a ceremony increases the already high probability that the reasonable observer, aware of the motto's history, would not perceive a display of "In God We Trust" as a government endorsement of religion.

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6. In fact, the posters at issue in *Schmidt* and *Loudoun* may have been in greater danger of violating the Establishment Clause than is the display at issue here. The posters in *Schmidt* applied special emphasis to the word "God," which appeared in large red lettering. 127 F.Supp.2d 1169, 1171 (D.Kan.2000). The posters in *Loudoun* were placed in schools (a venue typically receiving closer First Amendment scrutiny due to coercion concerns) and were donated by religious groups. 251 F.Supp.2d 1262,1273 (E.D.Va.2003), *appeal docketed*, No. 03-1364 (4th Cir. December 30, 2003). Such considerations are not present in this case.

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Further, Plaintiffs do not allege that any plaque or other identifying inscription suggests that the display endorses religion; rather, Plaintiffs complain that no such feature exists to identify the phrase as the national motto. (*See id.* ¶¶ 3(m), (n).) Where, as discussed above, a phrase would be commonly recognized by the reasonable observer as a secular acknowledgment of history, the absence of any explanatory sign or plaque does not suggest a religious affiliation. *Cf. County of Allegheny,* 492 U.S. at 598-600, 109 S.Ct. at 3103-05 (considering a crèche display inside a government building and concluding that the addition of the words "Glory to God in the Highest!" and a sign identifying the display as owned by a Roman Catholic organization heightened the appearance of government endorsement).

In short, neither the display itself nor any accompanying ceremony or plaque emphasizes the "brief reference" to God which appears in our national motto. *North Carolina Civil Liberties Union Legal Found. v. Constangy,* 947 F.2d 1145, 1151 (4th Cir.1991). The mere mention of God does not, in this context, create an Establishment Clause violation. *Cf. Freethought Soc'y of Greater Philadelphia v. Chester County,* 334 F.3d 247, 264 (3rd Cir.2003) (stating that, as to the phrases "In God We Trust" and "God save the United States and this Honorable Court," the reasonable observer is "aware of the history of these invocations of God" and "views the religious language as tempered by the secular meaning that has emerged over the passage of time; the overall effect is that the reasonable person would not perceive in these phrases a government endorsement of religion (despite the clear use of the word 'God.')"); *Schmidt,* 127 F.Supp.2d at 1171 (finding county treasurer's display of a

poster bearing the national motto to be constitutional, despite the poster's emphasis of the word "God," which appeared in red lettering larger than the black font used to print the rest of the motto). Returning to the lengthy string of cases which have considered the motto, it is clear that this reference to God and others like it "are merely examples of 'ceremonial deism' . . . repeated so often that their religious meaning has diminished." *Constangy*, 947 F.2d at 1151 (quoting *County of Allegheny*, 492 U.S. at 630, 109 S.Ct. at 3121 (O'Connor, J., concurring)).

In light of the motto's history and in the absence of any feature that could indicate religious affiliation, the simple appearance of "In God We Trust" on the Davidson County Governmental Center does not have the principal effect of advancing religion. Moreover, the display, when considered from the perspective of a reasonable observer, does not endorse religion. *See, e.g., Gaylor*, 74 F.3d at 217 (holding that a reasonable observer, "aware of the purpose, context, and history of the phrase 'In God we trust' would not consider its use . . . to be an endorsement of religion"). Accordingly, the display does not violate either the endorsement test or the second prong of the *Lemon* test; Plaintiffs have failed to state a claim under the Establishment Clause on either of those bases.

3. Excessive Entanglement

The only remaining ground on which Plaintiffs may succeed in stating a violation of the Establishment Clause is their claim that the display creates excessive government entanglement with religion. *See Lemon*, 403 U.S. at 612, 91

S.Ct. at 2111. This third prong of the *Lemon* analysis is intended to effectuate the Establishment Clause's "protection [against] 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* (quoting *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411 (1970)).

In *Gaylor v. United States*, the Tenth Circuit held that the national motto "does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state." 74 F.3d 214, 216 (1996). Other courts that have examined the motto under the *Lemon* test reached similar results. *See, e.g., O'Hair v. Blumenthal*, 462 F.Supp. 19, 20 (W.D.Tex.1978) ("[I]t would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion."), *aff'd per curiam sub nom. O'Hair v. Murray*, 588 F.2d 1144 (5th Cir.1979). Accordingly, the motto itself does not foster excessive entanglement between government and religion.

Whether or not the motto, when permanently displayed on a local government building, gives rise to excessive entanglement appears not to have been addressed by any court. When considering Establishment Clause challenges brought against other types of displays, courts generally consider both the expenditure of government funds and any "ongoing, day-to-day interaction between church and state" that may result. *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1152 (4th Cir.1991) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 684, 104 S.Ct. 1355, 1365 (1984)).

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In this case, there has been no allegation that the display in question causes the Board to interact with religious groups or individuals or that the Board has made any actual expenditure to install or maintain the display. *Cf. Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365 (finding that a crèche display did not give rise to impermissible entanglement when there "is no evidence of contact with church authorities concerning the content or design of the exhibit. . . . No expenditures for maintenance of the crèche have been necessary. . . . In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries."). There is no indication that any government action at issue in this case can be likened to "the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*." *Id.* (citation omitted) (quoting *Lemon*, 403 U.S. at 619-622, 91 S.Ct. at 2114-15).

Even if the court assumes that the Board is responsible for maintaining the display, courts have found that similar, de minimis expenditures did not result in excessive entanglement or otherwise violate the Establishment Clause. *See, e.g., id.* (finding that a crèche, when included in a display with secular Christmas items, did not create excessive entanglement when no expenditures for maintenance of the crèche were necessary); *Suhre v. Haywood County*, 55 F.Supp.2d 384, 398 (W.D.N.C.1999) (finding that a courthouse display of the Ten Commandments did not cause excessive entanglement when expenditures of government funds were "minute" and only necessary for cleaning, and the funds were not used to support religious organizations). The performance of routine upkeep for the display at issue,

which apparently requires little to no maintenance, simply does not give rise to a violation of the Establishment Clause.

To further assert impermissible entanglement, Plaintiffs allege that the installation of the display "has resulted in political division along religious lines in Davidson County." (First Am. Compl. ¶ 3(z).) In support of this proposition, Plaintiffs cite two Fourth Circuit decisions which found that government speech violated *Lemon*'s third prong by producing political divisiveness. *See Constangy*, 947 F.2d at 1152; *Hall v. Bradshaw*, 630 F.2d 1018, 1021 (4th Cir.1980).

The Fourth Circuit opinions on which Plaintiffs rely are distinguishable from the present case. First, both *Constangy* and *Hall* involved government prayer. *See Constangy*, 947 F.2d at 1147 (considering a state court judge's practice of opening morning sessions with a prayer); *Hall*, 630 F.2d at 1019 (considering a prayer printed on official state maps). As already discussed herein, the Fourth Circuit has consistently applied the *Lemon* test more stringently when evaluating government action that involved inherently religious acts or symbols. *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 374 (4th Cir.2003), *cert. denied*, 124 S.Ct. 1750 (2004) (concluding that a school prayer was "plainly religious in nature" and violative of the Establishment Clause despite the stated secular purposes of promoting tradition and religious tolerance (quoting *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 194 (1980) (per curiam))); *Smith v. County of Albemarle*, 895 F.2d 953, 957-58 (4th Cir.1990) (finding a crèche display to be "indisputably religious" and violative of the Establishment Clause despite the stated secular purpose of celebrating the Christmas holiday). In cases involving

prayer, the Fourth Circuit has additionally and consistently expressed concern, not only that such government action is inherently religious, but also that government prayer is coercive and promotes certain theological practices over others. *See, e.g., Mellen,* 327 F.3d at 371-72; *Constangy,* 947 F.2d at 1151; *Hall,* 630 F.2d at 1021. Such concerns are simply not present in this case, which, as discussed previously, does not involve an "indisputably religious" government act.

The Fourth Circuit's close consideration of prayer cases and the absence of the same concerns here indicates that the potential for political divisiveness is also lessened in this case. This reasoning is supported by the Fourth Circuit's discussions in *Constangy* and *Hall;* in both cases the court compared government prayer to "In God We Trust" and opined that the phrase does not violate the Establishment Clause. *See Constangy,* 947 F.2d at 1151 ("The words, 'In God We Trust,' on coin and currency have been upheld as a 'patriotic and ceremonial' motto with 'no theological or ritualistic impact.'" (quoting *Aronow v. United States,* 432 F.2d 242, 243 (9th Cir.1970))); *Hall,* 630 F.2d at 1023 ("References to the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect . . . our history and no longer have any potentially entangling theological significance.").

Since the Fourth Circuit has consistently treated government prayer as inherently raising greater cause for concern than other Establishment Clause challenges, *Constangy* and *Hall* are both distinguishable from the case at bar. Because the Fourth Circuit explicitly noted in both

cases that the national motto does not violate the Establishment Clause, it is particularly tenuous to argue that those opinions support a finding that a local government's display of the national motto is unconstitutional.

Constangy and *Hall* are further distinguishable because, unlike the plaintiffs in those cases, Plaintiffs here have failed to show any other ground on which the display at issue violates the Establishment Clause. *See Constangy*, 947 F.2d at 1152 (concluding that the prayer at issue violated all three prongs of the *Lemon* test); *Hall*, 630 F.2d at 1019-21 (same). The Supreme Court has indicated that, where other grounds from which to find an Establishment Clause violation are absent, political divisiveness alone is not sufficient to strike down a government action. *See Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365 (noting that the Court has never held political divisiveness alone to be a basis for invalidating state action and stating that "no inquiry into potential political divisiveness is even called for" when "direct subsidy to church-sponsored schools or colleges, or other religious institutions" is absent); *see also id.* at 689, 104 S.Ct. at 1367-68 (O'Connor, J., concurring) (noting that the Court has "never relied on divisiveness as an independent ground for holding a government practice unconstitutional. . . . [T]he existence of the litigation . . . itself may affect the political response. . . . [T]he constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.").

This persuasive dicta from the Supreme Court indicates that, because Plaintiffs have failed to state a claim under the

Establishment Clause on any other ground, political divisiveness alone cannot form the sole basis for their cause of action. As set forth above, the Fourth Circuit opinions finding political divisiveness to be a source of impermissible entanglement are distinguishable from this case. As such, this court cannot conclude that the display of "In God We Trust" creates excessive entanglement on the grounds expressed in *Constangy* and *Hall.*

Plaintiffs have alleged no fact that demonstrates a cognizable Establishment Clause claim based on excessive government entanglement with religion. It is apparent that any maintenance of the display will not, in fact, give rise to such entanglement, and political divisiveness alone (assuming any has occurred) cannot form the basis of an Establishment Clause claim. Accordingly, this court concludes that the display will not necessitate extensive government involvement with religion and, therefore, does not violate the third prong of the *Lemon* test. As such, Plaintiffs have failed to state a claim under the Establishment Clause on the basis that the display causes excessive entanglement between government and religion.

III. CONCLUSION

As set forth above, this court concludes that the display of "In God We Trust" on the Davidson County Governmental Center was not instituted without an actual, secular purpose, does not convey to the reasonable viewer a government endorsement of religion, and will not produce an excessive entanglement of church and state. The display does not,

therefore, violate the Establishment Clause as a matter of law. As such, Plaintiffs have failed to state a claim upon which relief may be granted.

Having found that Plaintiffs have standing to bring this constitutional challenge, the court will deny as futile Plaintiffs' motion to amend their First Amended Complaint. Having found as a matter of law that Plaintiffs failed to state a claim upon which relief may be granted, the court will grant the Board's motion to dismiss the First Amended Complaint. A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 25 day of May 2004.

s/_____
William L. Osteen
United States District Judge

APPENDIX C — FIRST AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, SALISBURY DIVISION FILED SEPTEMBER 15, 2003

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Salisbury Division

No. 1:03CV0592

Charles F. Lambeth, Jr., and Michael D. Lea,

Plaintiffs

vs.

The Board of Commissioners of Davidson County, North Carolina,

Defendants

(This First Amended Complaint amends Paragraph 3 of the Complaint, and otherwise makes no changes in the Complaint.)

FIRST AMENDED COMPLAINT

Plaintiffs, complaining of Defendant, say:

1. This is an action to remedy the deprivation, under color of State law, of rights secured to Plaintiffs by the Establishment Clause of the First Amendment to the United States Constitution. It is brought pursuant to 42 U.S.C. § 1983. This Court has subject matter jurisdiction pursuant to 28 U.S.C. 1331 and 1343.

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2. The individual Defendants are sued in the capacity of their offices.

3(a). Since on or about December 31, 2002, the Defendants have displayed the words "In God We Trust" (hereafter sometimes "the words" or "these words" or "the display") on the front facade and above the main entrance of the Davidson County Governmental Center (hereafter sometimes "the building") in Lexington, North Carolina.

(b) These words are displayed in 18 inch block letters.

(c) These words are prominently displayed.

(d) The space over the front door of the building is a dominant and architecturally central feature of the building.

(e) It is obvious to a reasonable observer that the building is a government building.

(f) The Davidson County Governmental Center is the seat of government of Davidson County, North Carolina.

(g) The display of these words (hereafter sometimes "the display") is readily visible to all who enter the building.

(h) The display appears to have been recently installed on the building. No governmental ceremony marking the display was held at its installation. No governmental ceremony marking the display has been held since its installation.

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(i) The display is presented in larger size letters than any other words displayed on the building.

(j) These words are presented more prominently than any other words displayed on the building.

(k) The only words other than "In God We Trust" on the front facade are the name of the building.

(l) "In God We Trust" is more prominently displayed than the name of the building.

(m) Nowhere on the exterior of the building are these words identified as being the national motto.

(n) Nowhere in the interior of the building are these words identified as being the national motto.

(o) The display states a religious message.

(p) The display conveys a religious message to almost all readers of them.

(q) The Defendants intended that the installation of the display affix a religious message to a government building.

(r) The Defendants intended that the installation of the display affix a prominent religious message to a government building.

(s) The seat of government is the location in Davidson County that is most likely to indicate a close connection between the government of Davidson County and any message that is prominently stated on it.

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(t) The vote to install the display was 4-2.

(u) The religious nature of the words was repeatedly emphasized by members of the public who spoke at the meeting at which the Defendant authorized the display to be installed.

(v) At the meeting at which the defendant authorized the display at issue to be installed the religious nature of these words was repeatedly emphasized by some of the Commissioners of Defendant who voted in favor of the installation of the display.

(w) The fact that these words are also the national motto was mentioned but not emphasized at the meeting at which defendant authorized the display.

(x) One of the two Commissioners who voted against the installation of the display stated, at the meeting at which defendant authorized the display, that he opposed the installation because he felt that it violated the Constitution.

(y) One of the Commissioners who voted in favor of the installation of the display stated, at the meeting at which defendant authorized the display, that a vote against the installation would be perceived as a vote against God.

(z) The installation of this display has resulted in political division along religious lines in Davidson County.

(aa) The exterior of the building is not available for the display of messages not approved by the defendant.

(bb) Defendant would not approve the installation of a message which contradicted the message "In God We Trust."

(cc) Defendant would not approve the installation of a message which impeached the message of "In God We Trust."

(dd) The display is objectionable to many religious adherents because to them governmental use of religion corrupts religion.

(ee) The display is objectionable to many non-adherents of religion because to them it sends a message that they are less than full members of the political community.

(ff) A reasonable observer would perceive the display to be an endorsement of religion.

4. The installation and continued maintenance of this display violates the Establishment Clause of the First Amendment to the United States Constitution.

5. The Plaintiffs are each licensed North Carolina attorneys who live and practice law in Davidson County, North Carolina. Each has contact with the display in the course of his professional activities in Davidson County. Each is offended by the display, which is to him a religious statement by the County government.

6. Plaintiffs have no plain, adequate or complete remedy at law for the unconstitutional actions of Defendant.

Appendix C

WHEREFORE, Plaintiffs pray that the Court declare the maintenance of the display of "In God We Trust" unconstitutional, order that it be removed, and award Plaintiffs their costs, counsel fees, and other relief as merited.

Respectfully submitted, September 15, 2003.

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Supreme Court, U.S.
FILED
OCT 12 2005
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No. 05-203

IN THE

Supreme Court of the United States

CHARLES F. LAMBETH, JR. and MICHAEL D. LEA,

Petitioners,

v.

THE BOARD OF COMMISSIONERS OF DAVIDSON COUNTY, NORTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners Charles F. Lambeth, Jr. and Michael D. Lea, two attorneys who live and practice law in Davidson County, North Carolina, brought this civil action under 42 U.S.C. § 1983 against the respondent Board of Commissioners of Davidson County on June 24, 2003. Petitioners allege that the display of our national motto "In God We Trust" on the Davidson County Governmental Center, authorized by the respondent, violates the Establishment Clause of the First Amendment to the United States Constitution.[1] In their First Amended Complaint, the petitioners allege that our national motto is "prominently displayed" on the Davidson County Governmental Center, that the national motto is "readily visible to all who enter the building," and that the plaintiffs are "offended" by the display of our national motto.

On October 2, 2003, the respondent moved to dismiss the petitioners' First Amended Complaint, contending that plaintiffs' claim under the Establishment Clause fails as a matter of law. On May 25, 2004, the United States District Court for the Middle District of North Carolina issued its Order and Judgment and Memorandum Opinion, granting respondent's motion and dismissing petitioners' First Amended Complaint on the grounds that it failed to state a claim of a First Amendment violation upon which relief could be granted.

On June 14, 2004, the plaintiffs filed a notice of appeal from the District Court's Order and Judgment. On May 13,

---

1. The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

2005, the Court of Appeals for the Fourth Circuit affirmed, concluding that petitioners' First Amended Complaint fails to state a claim for relief under the Establishment Clause upon which relief can be granted.

REASONS FOR DENYING THE PETITION

In their petition for writ of certiorari, petitioners contend that the words "In God We Trust," which were established by Congress as our national motto in 1956,[2] are contained in the lyrics of our national anthem, have been displayed on all United States currency and coins since 1955, are inscribed above and behind the Speaker's Chair in the United States House of Representatives, are inscribed above the main door of the United States Senate chamber, and which also appear on the Davidson County Governmental Center, are a religious creed that violates the Establishment Clause. Petitioners posit that this Court's recent decision in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. __, 125 S. Ct. 2722 (2005), which addressed a display of the Ten Commandments, rather than the national motto, compels such a conclusion.

This Court and its Justices have consistently recognized that our national motto, "In God We Trust," does not violate the Establishment Clause. Moreover, there is no dissension among the United States Circuit Courts of Appeal on this matter. Each of the various Circuit Courts of Appeal that has addressed the matter has concluded that our national motto, "In God We Trust," does not violate the Establishment Clause. Accordingly, there is no disagreement among the

2. *See* 36 U.S.C. § 302; Pub. L. No. 851, 70 Stat. 732, 84th Cong., 2d Sess. (July 30, 1956).

Courts of Appeals that requires resolution by this Court. Finally, petitioners' reliance on *McCreary County, Ky. C. American Civil Liberties Union of Ky*, 545 U.S. __, 125 S. Ct. 2722 (2005), which addressed the display of the Ten Commandments, and not our national motto, is misplaced. For these reasons, respondents respectfully submit that this Court ought to deny petitioners' petition for writ of certiorari.

I. The Supreme Court and its Justices have recognized that a government's use or display of our national motto "In God We Trust" does not violate the Establishment Clause.

This Court and various individual Justices have stated on numerous occasions that a governmental entity's use or display of our national motto does not violate the Establishment Clause. In *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), the case striking down school prayer, this Court strongly implied that display of the national motto in public schools would not violate the Establishment Clause:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for country by reciting historical documents such as the Declaration of Independence which contain references to Deity or by singing officially espoused anthems which contain the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions

> bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

370 U.S. at 435, n.21, 82 S. Ct. at 1269, n.21.

In *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1983), this Court held that the inclusion of a nativity scene in the city's Christmas display did not violate the Establishment Clause of the First Amendment. This Court observed that the Constitution does not require a "complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673, 104 S. Ct. at 1359. This Court noted the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 674, 104 S. Ct. at 1360. This Court cited the designation of Thanksgiving and Christmas, two holidays with clear religious origins, as an example of government recognition of this country's religious heritage. *Id.* at 676, 104 S. Ct. at 1360. Similarly, this Court in *Lynch* observed that Congress employs chaplains; that military chaplains are paid for with federal funds; that the tax-payer-supported National Museum displays religious paintings depicting such events as the birth of Christ, the Crucifixion, and the Resurrection; and that many Presidents have issued proclamations establishing a National Day of Prayer. *Id.* at 676, 104 S. Ct. at 1361. Significantly, this Court also pointed to the national motto "In God We Trust" as a constitutionally acceptable expression of this country's religious heritage. *Id.* at 676, 104 S. Ct. at 1361.

In her concurring opinion in *Lynch*, Justice O'Connor stated that government acknowledgments of religion, such as the "declaration of Thanksgiving as a public holiday," the national motto, and opening court sessions with "God Save the United States and this honorable court" did not violate the Establishment Clause:

> Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 693, 104 S. Ct. at 1369 (O'Connor, J., concurring).

The dissenting opinion in *Lynch*, authored by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, also recognized that:

> [S]uch practices as the designation "In God We Trust" as our national motto . . . can best be understood . . . as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. . . . The religious works on display at the National Gallery, Presidential references to God during an Inaugural Address, or the national motto present

> no risk of establishing religion. . . . Their message is dominantly secular.

465 U.S. at 716-717, 104 S. Ct. at 1382 (Brennan, J., dissenting). *See also School District of Abington Township v. Schempp*, 374 U.S. 203, 303, 83 S. Ct. 1560, 1614, 410 L. Ed. 2d 844 (1963) (Brennan, J., concurring) (Justice Brennan stated that the national motto was "so deeply interwoven into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits").

Six years after *Lynch*, in *County of Allegheny v. American Civil Liberties Union, et al.*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989) (Blackmun, J.), the Court again referred to the national motto, stating that it was a constitutionally acceptable form of "ceremonial deism." 492 U.S. at 602-03, 109 S. Ct. at 3106. In *County of Allegheny*, Justice O'Connor authored a concurring opinion, which was joined by Justices Brennan and Stevens, in which she stated that the national motto did not violate the Establishment Clause, because it served the secular purpose of "solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society." 492 U.S. at 625, 109 S. Ct. at 3118 (O'Connor, J., concurring). Moreover, in *County of Allegheny*, the dissenting opinion of Justice Kennedy, which was joined by Justices Scalia, Rehnquist, and White, clearly indicates that these justices do not believe that the national motto runs afoul of the Establishment Clause. 492 U.S. at 673, 109 S. Ct. at 3143-44 (Kennedy, J., concurring and dissenting). *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 322-23, 120 S. Ct. 2266, 2286 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas,

J.J.) (noting that the Establishment Clause does not prohibit singing the national anthem with its concluding verse "And this be our motto: 'In God is our trust'" at public school functions).

More recently, in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301 (2004), Chief Justice Rehnquist authored a concurring opinion, joined by Justice O'Connor, in which he strongly suggested that the national motto "In God We Trust" did not violate the Establishment Clause, stating as follows:

> . . . [O]ur national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R.Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). Giving additional support to this idea is our national anthem "The Star-Spangled Banner," adopted as such by Congress in 1931. 36 U.S.C. § 301 and Historical and Revision Notes. The last verse ends with these words:
>
> "Then conquer we must, when our cause it is just,
>
> "And this be our motto: 'In God is our trust.'
>
> "And the star-spangled banner in triumph shall wave

> "O'er the land of the free and the home of the brave!"

124 S. Ct. at 2319 (Rehnquist, C.J., concurring).

Justice O'Connor, in a separate concurring opinion in the *Newdow* case, reiterated that the category of "ceremonial deism . . . clearly encompasses . . . the national motto ("In God We Trust")," and that, therefore, the display of the national motto is not a constitutional violation. 124 S. Ct. at 2323 (O'Connor, J., concurring).

Thus, as shown in the above discussion, every member of the Supreme Court who has expressed any opinion about the national motto has stated that it poses no Establishment Clause problems. In fact, three current Justices of the Supreme Court, as well as ten prior Justices, have recognized that the national motto does not violate the Establishment Clause. No member of this Court, past or present, has ever suggested otherwise. Indeed, for decades, this Court and individual Justices "have grounded [their Establishment Clause] decisions in the oft-repeated understanding," *see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67, 116 S. Ct. 1114 (1996), that the national motto, and similar references, are constitutional. The opinions of this Court in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), *School District of Abington Township v. Schempp*, and *Engel v. Vitale*, have repeatedly affirmed the constitutionality of official references to the Nation's religious heritage and "the many manifestations in our public life of belief in God." *Engel*, 370 U.S. at 435 n.21, that form "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and that acknowledge that "our national life reflects a religious people." *Abington Township*, 374 U.S. at 213.

This Court's opinions establish as settled law that official acknowledgments, in public life, of the Nation's religious heritage and character do not constitute a prohibited endorsement of religion and do not otherwise violate the Establishment Clause. "[P]ublic acknowledgment of the [Nation's] religious heritage long officially recognized by these three constitutional branches of government" renders "farfetched" "[a]ny notion that these symbols pose a real danger of establishment of a state church." *Lynch*, 465 U.S. at 686. As pointedly explained by this Court in *County of Allegheny*, the national motto is one such permissible official acknowledgment of the role of religion in the Nation's culture and history, and it is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603.

In sum, this Court and its Justices have consistently pronounced that our national motto "In God We Trust" does not run afoul of the Establishment Clause and that the display of the national motto is not a constitutional violation. A governmental entity's use or display of the national motto "In God We Trust" does not violate the Establishment Clause. The posting of the national motto by Davidson County on its Governmental Building is

> no more an endorsement of religion than . . . legislative prayers . . . , government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." [These] government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public

> occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, [these] practices are not understood as conveying government approval of particular religious beliefs. [They] cannot fairly be understood to convey a government endorsement of religion.

Lynch, 465 U.S. at 692-93, 104 S. Ct. at 1369-70 (O'Connor, J., concurring).

II. There is no disagreement among the Circuit Courts, which have consistently held that our national motto does not violate the Establishment Clause, that needs resolution by this Court.

The United States Courts of Appeals that have considered the issue of whether our national motto "In God We Trust" violates the Establishment Clause have uniformly held that a governmental entity's use or display of the national motto does not violate the Establishment Clause. Respondent's research has failed to uncover a single case, including any District Court opinion, in which the display of the national motto has been held to violate the Establishment Clause. Accordingly, there is no disagreement amount the Circuit Court which requires the attention of this Court.

In *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211, 116 S. Ct. 1830, 134 L. Ed. 2d 934 (1996), the Tenth Circuit squarely and unambiguously held that the national motto "In God We Trust" does not violate the Establishment Clause. The Tenth Circuit held that the national motto "clearly [has] a secular purpose, . . .

symbolizes the historical role of religion in our society, . . . fosters patriotism, and expresses confidence in the future." 74 F.3d at 216 (numerous citations omitted). The Tenth Circuit further held that "[t]he motto's primary effect is not to advance religion" and that it "does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state." *Id.* Further, the Tenth Circuit held that a reasonable observer, "aware of the phrase 'In God We Trust,' would not consider its use . . . to be an endorsement of religion." 74 F.3d at 217.

Similarly, in *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979), *cert. denied*, 442 U.S. 930, 99 S. Ct. 2862, 61 L. Ed. 2d 298 (1979), the Fifth Circuit held that the national motto did not violate the Establishment Clause. In so holding, the Fifth Circuit "affirmed the opinion of the district court," which opinion stated in part as follows:

> . . . [T]he national motto . . . has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a government sponsorship of a religious exercise. . . . Moreover, it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion. . . .
>
> The Court notes that language in Supreme Court cases indicates that the national motto . . . does not infringe on First Amendment rights. *In School District of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) . . . , the Court recognized that in

> the national public life there are many manifestations of a belief in a Supreme Being which do not violate the First Amendment. As Justice Brennan explained in a concurring opinion, these various activities include the use of the motto in "In God We Trust." "It is not that the use of these fou[illegible]ords can be dismissed as 'de minimis'. . . . The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not represent the type of involvement, which the First Amendment prohibits."

O'Hair v. Blumenthal, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978) (some citations omitted).

In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), the Ninth Circuit upheld the dismissal of plaintiff's complaint, which asserted that the national motto was violative of the Establishment Clause. In holding that our national motto did not run afoul of the Establishment Clause, the Ninth Circuit stated as follows:

> It is obvious that the national motto . . . has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of religious exercise.

432 F.2d at 243.

In addition to the opinion of the Fourth Circuit below in this case, the Fourth Circuit on at least two other occasions has held that the use of the phrase "In God We Trust" does

not violate the Establishment Clause. *See North Carolina Civil Liberties Union Legal Foundation v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992) (stating that the words "In God We Trust" "have been upheld as a 'patriotic and ceremonial' motto with 'no theological or ritualistic impact'"); *Hall v. Bradshaw*, 630 F.2d 1018, 1022 (4th Cir. 1980), *cert. denied*, 450 U.S. 965, 101 S. Ct. 1480, 67 L. Ed. 2d 613 (1981) (stating that references to God in governmental ceremonies, coins, and seals – such as "In God We Trust" – "do not violate the Establishment Clause").

At least four other United States Circuit Courts of Appeal have stated, or strongly suggested, that the use of the national motto does not violate the Establishment Clause. *See, e.g., Glassroth v. Moore*, 335 F.3d 1282, 1300 (11th Cir. 2003) (strongly suggesting that the national motto does not violate the Establishment Clause); *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247, 264-65 (3rd Cir. 2003) (agreeing that the use of "In God We Trust" does not violate the Establishment Clause); *American Civil Liberties Union of Ohio v. Capital Square Review and Advisory Board*, 243 F.3d 289, 301 (6th Cir. 2001) ("The Supreme Court has never questioned the proposition that the national motto can withstand scrutiny under the Establishment Clause, and we should be utterly amazed if the Court were to question the motto's constitutionality now"); *Sherman v. Community Consolidated School Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (observing that the phrase "In God We Trust" is "secular, having lost [its] original religious significance"); *citing ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), *cert. denied*, 479 U.S. 961, 107 S. Ct. 458, 93 L. Ed. 2d 403 (1986).

Accordingly, every Circuit Court that has ever addressed the constitutionality of our national motto has held that it does not violate the Establishment Clause. There is no disagreement among the lower federal courts regarding this issue that necessitates review by this Court.

III. Petitioner's Reliance on *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. __, 125 S. Ct. 2722 (2005) is Misplaced.

Petitioners argue that this Court's opinion in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. __, 125 S. Ct. 2722 (2005), which addressed the display of the Ten Commandments, compels a reversal of the Fourth Circuits' opinion in this matter. This reliance upon *McCreary County* is misplaced.

McCreary County addressed the display of Ten Commandments, which this Court has held "are undeniably a sacred text in the Jewish and Christian faiths" and are "an instrument of religion." 545 U.S. __, 125 S. Ct. at 2732; *citing Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980); *School Dist. of Abington, Township v. Schempp*, 374 U.S. 203, 224 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963). In contrast to the Ten Commandments, our national motto, as discussed above, has been repeatedly held to convey a dominantly secular message which does not violate the Establishment Clause. Even if the repeated findings by this Court that our national motto is a constitutionally acceptable form of ceremonial deism is incorrect, and that it instead has some religious meaning, this Court has held that "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden v.*

Perry, 575 U.S. __, __, 125 S. Ct. 2854, 2863 (2005), *citing Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, (1983); *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330 (1983); *McGowan v. Maryland*, 366 U.S. 420, 437-440, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 676-678, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). While the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity", *Walz*, 397 U.S. at 668, the Establishment Clause was never intended to "entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *County of Alleghany*, 492 U.S. 573, 623 109 S. Ct. 3086 (O'Connor, J. concurring).

Petitioners argue that the opinion in *McCreary* altered the first prong of the *Lemon* test to require only an "ostensible and predominant purpose of advancing religion." 545 U.S. __, 125 S. Ct. at 2733. However, a review of the opinion in *McCreary* reveals that the guidance set forth in *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985), "that a statute must be invalidated if it is entirely motivated by a purpose to advance religion," and in *Lynch v. Donnelly*, 465 U.S. 668, 680, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1983) that the purpose inquiry looks to determine whether government "action was motivated wholly by religious considerations," was not overruled. Indeed, this Court cited *Wallace* and *Lynch* with approval in numerous places in its *McCreary* opinion. In any event, it his difficult to fathom how the display of our national motto, which conveys a secular message, could have the "ostensible and predominant purpose of advancing religion."

With regard to the petitioner's second argument regarding the application of the endorsement test to the assessment of secular purpose, this Court noted in *McCreary* that observers are "presumed to be familiar with the history of the government's actions and competent to learn what history has to show." 545 U.S. at __, 125 S. Ct. at 2737, *citing Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266. In this case, the observer is a citizen who is presumed to know that "In God We Trust" is our national motto, and knows that such words have been displayed for decades on government buildings and on the coins and paper money he or she carries in his or her pockets.

Petitioners rely completely on the *McCreary* decision handed down by the Supreme Court, but fail to mention whatsoever the *Van Orden v. Perry*, 575 U.S. __, __, 125 S. Ct. 2854, 2863 (2005) opinion handed down the very same day, which upheld the constitutionality of the display of the Ten Commandments on the grounds of the Texas State Capitol. In choosing not to apply the *Lemon* test in *Van Orden*, the Court's plurality opinion noted that "the factors identified in *Lemon* serve as no more than helpful signposts." 575 U.S. at __, 125 S. Ct. at 2861, *citing Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973). In any event, Justice Breyer's opinion in *Van Orden* notes that courts must look at the history, purpose and context of a particular display in determining whether it is a symbolic endorsement of religion. *Van Orden v. Perry*, 575 U.S. at __, 125 S. Ct. at 2869 (2005) ("I see no test-related substitute for the exercise of legal judgment"). Consideration of the history, purpose and context of our national motto, in addition to the decisions and opinions of this Court addressing our national motto, demonstrate that it does not constitute a symbolic endorsement of religion and does not violate the Establishment Clause.

CONCLUSION

WHEREFORE, the Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

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In The
Supreme Court of the United States

CHARLES F. LAMBETH, JR.,
AND MICHAEL D. LEA,

Petitioners,

v.

THE BOARD OF COMMISSIONERS OF
DAVIDSON COUNTY, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

1.

This is not a case about the national motto as such

The first and second arguments in the brief in opposition rehearse the dicta in this Court and the holdings in the lower courts concerning the national motto as such and its use on coin and currency. None of those cases considered legislative motive or the development of the presentation of the display. The case presented here is different in kind from those cases. It involves the display of "In God We Trust" unidentified as the national motto, recently installed as the most prominent feature of the main County building, and intended to and reasonably perceived to state a religious message. This is, as the Fourth Circuit recognized,

> "governmental action which goes beyond traditional uses of the phrase, as discussed in the [Supreme] Court's dicta and by our precedents, which have been limited to the phrase's use on coins and currency, and as the national motto."

Pet. App. 10a. Accordingly the Fourth Circuit applied the *Lemon*[1] and endorsement tests, rather than a ceremonial deism or other analysis, to determine whether the Establishment Clause was infringed.

This is not just another national motto case, any more so than if the Congress enacted tomorrow that "Equal Justice Under Law" should be removed from the main pediment of this Court and replaced with "In God We Trust," with the purpose stated in the legislative history as

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[1] *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971)

being to bring this Nation back to a fundamental belief in God as the source of our laws.

This case presents allegations that the unidentified creed "In God We Trust" was displayed with a purpose to send a religious message and in fact sent such a message to an objective observer. This case is properly analyzed, on a motion to dismiss for failure to state a claim, under the rules formulated in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. ___, 125 S. Ct. 2722 (2005.)

2.

Analysis of *Van Orden v. Perry*, 545 U.S. ___, 125 S. Ct. 2854 (2005) demonstrates conclusively that the decision below is irreconcilable with *McCreary County v. ACLU of Kentucky* and therefore should be remanded for reconsideration

McCreary County ruled that the first prong of *Lemon* requires only an "ostensible and predominant purpose of advancing religion," 545 U.S. ___, 125 S. Ct. at 2733, not an entirely religious purpose.[3] A "primary" or a "preeminent" purpose to advance religion is sufficient to state a claim. 545 U.S. ___, 125 S. Ct. at 2735, *quoting Edwards v. Aguillard,* 482 U.S. 578, 594 (1987). It further held that the endorsement test, with its assessment of context and history, applied to the assessment of secular purpose, 545 U.S. ___, 125 S. Ct. at 2736-37. The Fourth Circuit failed to heed either of these rules. If it had, it would have found that Petitioners had stated a claim.

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[3] Petitioners argued in the Fourth Circuit that "dominant" purpose was the test. Pet. App. 6.

Respondent argues that *Van Orden v. Perry*, 545 U.S. ___, 125 S. Ct. 2854 (2005), requires that the governmental religious statement made here be upheld. Respondents recognize, however, that *Van Orden* produced no majority opinion, and that the separate concurrence of Justice Breyer notes that courts "must look at the history, purpose and context of a particular display in determining whether it is a symbolic endorsement of religion." Brief in Opposition, 16. Petitioners agree with this proposition, and a fuller consideration of Justice Breyer's opinion drives home the point of how clearly *McCreary County* controls the case presented here.

Van Orden ruled that the religious display at issue there could remain in place, while *McCreary County* upheld a preliminary injunction against the continued maintenance of its display. The difference in result came about because Justice Breyer joined the opinion of the Court in *McCreary*, whereas in *Van Orden* he concurred in the result but not in the plurality's reasoning. He took differing views of (1) a Ten Commandments monument on State Capitol grounds, donated years ago by a private civic organization and expressly said by the donor to be for the purpose of combating juvenile delinquency, being one of 38 monuments and markers variously scattered elsewhere about the Capitol grounds, of which no record of official motivation survived and which had gone legally unchallenged for some forty years, and (2) recently posted, large, readily visible copies of the Commandments in courthouses, surrounded by historical documents featuring governmental religious statements, as to which suit had been brought shortly after their installation. Justice

Breyer weighed all these differences of fact in deciding whether the constitutional line had been crossed. By his own admission the critical difference was that the Capitol display had been in place, unchallenged, for some forty years. 125 S. Ct. at 2870 (" . . . a further factor is determinative here. . . . 40 years passed . . . "). By also expressly approving of Justice O'Connor's concurring opinion in *McCreary County, see Van Orden*, 125 S. Ct. at 2872, and by expressly joining the opinion of the Court in *McCreary County*, he made plain that while in his view the display of a long-unchallenged religious text as one among many placements was constitutionally permissible, the very same text was not permissible in a new, aggressive, untraditional imposition – that his letting pass the Capitol display was not a signal to those who would seize upon the verisimilitude of newly proposed religious impositions in the public sector to those essentially grandfathered by the passage of time.

The case at bar falls clearly on the *McCreary County* side of Justice Breyer's line. The complaint alleges that the predominant driving force of the recently imposed display was to raise the visibility of a religious motif, signaling to all who entered the Governmental Center that a singular religious credo governed within. The affront is distinctly more substantial than was the merely seasonal crèche in *Allegheny County v. ACLU*, 492 U.S. 573, 109 S. Ct. 3086 (1989).

CONCLUSION

The Fourth Circuit plainly erred in imposing a requirement that entirely religious purpose be pleaded, and that history and context were not to be considered in assessing purpose. The minimum required here is to reverse the judgment below and remand for reconsideration in light of *McCreary County*.

Respectfully submitted,

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